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European Asylum Law and its Relation to International Law

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Chapter 1

Introduction

In this Chapter, the object of inquiry is defined. Further, the relevant sources of international and European law are introduced, and the method and means of interpretation applied in this study are discussed.

1.1 The object of inquiry

[1] Asylum law has been enriched in the last few years by a number of measures of the European Community that address the legal relation between persons in need of protection and the Member States. These measures make up the Common European Asylum System – a body of law that covers all aspects of asylum law: qualification for protection, procedures for qualification, allocation, and secondary rights. Although its impact on asylum law and practice in the Member States remains to be seen, this system merits description and analysis, if only because of its comprehensiveness.

The description and analysis of European asylum law in this study focus on the relation with international law. The Refugee Convention and some other instruments of international law entitle certain categories of aliens to protection from expulsion and to secondary rights. The major part of the Community measures on asylum implicitly or explicitly addresses interpretation and application of this international law. I describe and analyse the rights and obligations laid down in the Community measures, and compare them to those set out in international law.

The relation between Community and international law on asylum raises some complex questions. According to the Treaty on European Community, these measures must be “in accordance” with the Refugee Convention and other treaty law on asylum. This requirement seems to establish a clear hierarchical relation between international law and Community legislation on asylum. Yet the relevant instruments of international law bind the Member States, not the Community. It is therefore unclear to what extent European law should secure “accordance” – it may imply an obligation to ensure that the whole body of international law on asylum is complied with, or merely prohibit Community legislation that is in outright violation of international law. Further, the requirement of “accordance” applies only to part of European legislation, which begs the question whether other legislation may deviate from international law. The consequences of the transfer of powers on asylum

to the Community for the obligations of the Member States under international law are another matter. Could European legislation influence their obligations under international law? If not, what should happen in case of a collision between rules of European and international asylum law?

[2] The relation between European law on asylum and international law can be approached from different points of view. A perfectly suitable one would be the position of the Member States of the Community. As the grant of asylum is “only the normal exercise of territorial sovereignty” of states,¹ transfer of powers on asylum to the Community infringes on the sovereignty of the Member States. Therefore, their position merits attention. Another possibility would be the position of the Community itself. The project of legislation on asylum was undertaken in order to facilitate the abolition of border controls between Member States.² Focusing on the Community would do justice to this objective of European asylum law. Moreover, the new area of European asylum law has impact on the Community’s very identity. At some points, European asylum law appears to conceive of the Community as the recipient of requests for protection. Thus, European asylum legislation speaks of “persons seeking protection in the Community”,³ and indeed makes it very possible that a person requesting protection from, say, Greece, is transferred to Ireland as if the Community, not a state, were approached.

But I have chosen a third alternative: the consequences for the individual in need of protection. Safeguarding the rights of aliens is also an objective of European asylum legislation.⁴ Other issues such as the division of competencies between the Community and the Member States will also be addressed. They will not, however, be addressed for their own sake, but only in so far as they have bearings on the legal position of the individual.

[3] The analysis is restricted to issues of law. Which instruments count as “law” and which means and methods of interpretation are applied, will be discussed in paragraphs 1.4 and 1.5. Here it should be stressed that the analysis is as far as possible abstracted from policy issues. Policy objectives may have shaped Community asylum law, but they are addressed only where they enter the realm of law, especially where they may serve as a means of interpretation. The same holds true for the decision-making process. Documents reflecting negotiations are only taken into account when they shed light on enigmatic provisions. Consequently, projects that have not (yet) resulted in legislation, such as reception in the region of origin, are not addressed.

This one sided approach also means that the analysis sticks to legal fic-

tions. Thus, the Member States as subjects of Community law, the Community legislator and the masters of the Treaty on European Community are treated as if they were separate entities. In fact, representatives of the Member States make up the organ that adopts Community legislation on asylum, and they are masters of the Treaty. Undoubtedly, the provisions of the Treaty on European Community on asylum, Community measures and domestic legislation to a fair extent all reflect the same policy objectives. To a more politically oriented mind, upholding the fiction that it concerns completely different entities may seem a distortion of reality. But there are good reasons to stick to those legal fictions. First of all, Community law itself imposes these distinctions; applying them is therefore necessary for a sound legal analysis. Secondly, the policy background of European asylum law has more than once been well described.⁵ Thirdly, I lack the skills to produce a sound political analysis.

Likewise, empirical issues are ignored as far as possible. Particular rules may have been adopted with a specific situation in mind – for example, rules on the issue of agents of protection may be based on the situation in certain countries such as Somalia or Northern Iraq before the American invasion. Further, rules may have little meaning in the sense that they could apply to a relatively small number of people, or conversely have great practical importance. Such considerations are however absent from this study. Numbers of protection seekers or recognised refugees, or the reception of protection seekers in proportion to reception elsewhere are not addressed. The reasons are again that I lack the necessary knowledge and skills, and that such considerations are alien to the questions stated.

Furthermore, the present inquiry is, in a sense, a-historical. I address the body of European asylum law as it is with international asylum law as it is now. Their historical development is in itself not relevant for assessing their relation. Thus, it has been convincingly argued that the last decades have shown a growing tendency to exclude group persecution, and that subsidiary forms of protection next to refugee protection owe their relevance to an ever more restrictive application of the refugee definition.⁶ Current European asylum law may be seen as an exponent of these developments: no mention is made of group persecution, and it grants a prominent place to subsidiary protection. But such considerations are in themselves not relevant for this inquiry. The historical development of European asylum may explain its present form; it cannot explain its legal meaning.

[4] Finally, domestic law is discussed when relevant for interpretation of international law, but legislation on asylum of the Member States does not, in itself,

make part of the object of inquiry. The picture offered in this book is therefore necessarily incomplete, for Community law and international law presuppose domestic systems of law for their functioning. But abstraction from the domestic law systems of the Member States may also have advantages. It makes it possible to execute a comparison of European with international law unclouded by notions from domestic law. For example, European asylum law is very much centred on the issue of residence permits. This entails a distinction between asylum seekers and persons with a residence permit which is quite self evident from the point of view of domestic law. But for international law, it is not – it rather distinguishes persons who are in need of protection from those who are not.

Nor do I address the reception of international or European law into domestic constitutional law. Hence, I accept and apply the tenets on the working of European law and of the European Convention of Human Rights within the domestic legal orders that are developed by the Court of Justice and the European Court of Human Rights without questioning them (cf. numbers [70] and [36]), although these tenets may not be accepted in some or most Member States.⁷

1.2 Questions and order of discussion

[5] This study of European law on asylum therefore focuses on its relation with international law, and in particular on the way it affects the legal position of persons requesting asylum. Neither the development of European asylum law or international law, nor domestic asylum law of the member states makes part of this study. The terms “asylum”, “European asylum law” and “international asylum law” will be defined in the following paragraphs (paragraphs 1.3, 1.4 and 1.5). Here, I will identify the questions that should be dealt with in order to assess this relationship properly.

To begin with, we should address the nature of this relationship: (1) *how do the systems of European or Community law and international law affect each other?* This question can be approached from two sides. First, the way international law may affect Community law (1a): *how can rules of international law on asylum have effect within the Community legal order?* Second, the way Community law may affect the working of international asylum law (1b): *does European asylum law have consequences for the legal position of the individual vis-à-vis the Member States in their capacity as party to the instruments of international asylum law?* Both questions are addressed in Chapter 2.

Connected to these questions is the scope of Community competencies, or rather of the division of competencies on asylum between the Community and the Member States. Hence, a second question is: (2) *to what extent is the Community competent or obliged to adopt legislation on asylum?* This issue is addressed in Chapter 3.

After having defined the relation between both systems of law and the scope of Community powers and obligations under international law on asylum, we can approach the central question: (3) *is European asylum law in conformity with international asylum law?* The assessment of conformity requires description and analysis of rules of Community law that may have bearings on the legal position of persons entitled to asylum, and comparison with relevant rules of international asylum law. This analysis and comparison is the main part of this book, and is carried out in the Chapters 4 to 8.

Finally, the focus on the individual's legal position introduces yet another issue (4): *which possibilities does Community law offer the individual for effectuating his claims under international law?* This issue is addressed in Chapter 9. In Chapter 10, I summarise the main conclusions and make some final observations.

1.3 “Asylum”

[6] Above, the term “asylum” was applied in the terms “European asylum law” and “international asylum law”. Which instruments are meant when I use these terms will be discussed in paragraphs 1.4 and 1.5 below. Here, I define the common element “asylum”.

The term “asylum” has no determined meaning, and is applied in different senses in different contexts.⁸ Instruments of international law allude to asylum, but do not define it or specify its meaning.⁹ Community law applies the term in different senses. In the Treaty on European Community, “asylum” is closely linked to protection offered pursuant to the Refugee Convention,¹⁰ which would be too narrow a definition for present purposes. In the term “common European asylum system” the meaning of “asylum” appears to be broader, but also quite indeterminate.¹¹ Hence, we should look elsewhere for a definition.

[7] In academic writing,¹² the definition of asylum adopted by the *Institut du Droit International* at its Bath Conference in 1950 is often applied:

“[...] le terme “asile” désigne [1] la protection [2] qu’ un Etat accorde [3]

sur son territoire ou dans un autre endroit relevant de certains de ses organes à [4] un individu qui est venu la chercher”¹³

- “the term “asylum” means [1] the protection [2] offered by a State [3] on its territory or elsewhere to [4] an individual who came to seek it” (numbers added, HB).

For present purposes, this definition is suitable although it needs specification. Firstly, the term “individual” (element [4]). As the drafters of this definition undoubtedly tacitly intended,¹⁴ the term asylum applies only to protection offered to aliens. States owe protection to their nationals on account of that nationality, which protection hence needs no juridical category. Thus, “an individual” should be understood as a person not possessing the nationality of the state he requests protection from. Secondly, the term “protection” (element [1]). “Protection” suggests some threat or danger from which the individual needs shelter. As the specification “*sur son territoire (...) à un individu qui est venu la chercher*” suggests, asylum concerns protection from some danger abroad. Hence, asylum concerns protection by a state from a danger that threatens the alien outside the state’s jurisdiction. Thirdly, the territorial scope (element [3]). The Bath definition intentionally covers both protection offered on the territory and protection offered at embassies and consulates. Diplomatic asylum is not addressed in this book, only requests for asylum with a view to protection on the territory of the requested state, wherever lodged (on its territory or at its border, or abroad). Fourthly, the definition restricts “asylum” to protection offered by “a state” (element [2]), thus excluding protection by a church or other non-state actors. As the Member States transferred powers concerning protection to the Community, we should not exclude beforehand that the Community could be the legal entity to which aliens should turn when requesting asylum within the European Union. Thus, asylum might be offered by states or, at least hypothetically, by the Community. In sum, the term “asylum” applied in this book means “protection offered to an alien on account of a threat abroad, by a state within its territory or by the Community within the European Union”.

1.4 International Asylum Law

[8] With “international asylum law”, I mean rules of international law that entail obligations or rights concerning “asylum” as defined above. In paragraph 1.4.1, I will delimit which types of instruments qualify as “law” for the purposes of this definition, and which of those instruments contain rules on

“asylum”. Rules and means of interpretation are addressed under 1.4.2. The effect of international law within the legal orders of the states concerned is primarily a matter of domestic, not international law. For the present study, the reception of international law within the Community legal order is of great importance, and will be discussed in Chapter 2.2.

1.4.1 Sources

The ICJ Statute

[9] Identification of “obligations” and “rights” entails that only binding rules of international law on asylum will be discussed. The question which rules of international law are binding is generally answered by reference to Article 38(1) of the Statute of The International Court of Justice, which states:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.¹⁵

The International Court of Justice further recognised unilateral declarations as a source of international law.¹⁶

The basis for regarding conventions, custom and principles as binding is the element of consensus of the states concerned.¹⁷ The notion of consent to be bound as the basis for obligation in international law has been criticised in academic writing.¹⁸ However, no alternative concept appears to be available.¹⁹ Moreover, the list in the statute is still predominantly used as the index of sources of international law.

Hence, conventions, custom, principles recognized “by civilized nations” and unilateral declarations are primary sources of international law, and judicial decisions and scientific writings secondary ones.²⁰ The primary sources are discussed in the present paragraph, the secondary ones under paragraph 1.4.2.

[10] Which treaties, rules of custom or principles address asylum? In paragraph 1.3, “asylum” was defined as “protection”. In order to identify the relevant instruments of international law, we should further delimit the meaning of the term “protection”.

In a narrow sense, “protection” is protection from subjection to human rights violations abroad. In a broad sense, it entails, apart from protection from being submitted to human rights violations abroad, permission to stay in the requested state. Further, it would entail permission to stay there under dignified conditions. Finally, if the alien is not yet present in the state he asks asylum from, it would entail a request for admission.

The right to asylum

[11] Does international asylum law confer a “right to asylum” in this broad sense? The provision coming closest to it appears to be Article 14(1) of the Universal Declaration of Human Rights, stating that

“Everyone has the right to seek and enjoy asylum”.²¹

It appears that “everyone” has a claim to enter (“to seek asylum”) as well as a right to stay there (to “enjoy asylum”). The provision does not, however, entail a right that aliens can successfully invoke: the Universal Declaration is a declaration and hence not a primary source of binding international law. Claims that either the Declaration taken as a whole or Article 14 in particular have acquired the quality of customary law,²² must be considered to be unfounded - both general state practice as well as *opinio juris* are lacking.²³ But even if the provision were binding, one cannot base on it a subjective right to enter or to reside. The ambiguous term “to enjoy”, in the - equally authentic - French language version “*bénéficier*”, must be read not as a right conferred to an individual, but rather as a privilege eventually accorded by the concerned state, and thus merely reaffirms the sovereign right to grant protection.²⁴ The right to “seek” is the right to request, not to receive asylum; it is a right *vis-à-vis* the country of origin, not the requested state.²⁵

The only other instrument that speaks of a “right to asylum” is Article 18 of the Charter of Fundamental Rights (Article 78 of the Draft Constitution for Europe). As the provision functions within the context of European law, I will deal with it in that context (see further paragraph 2.3.5).

The Refugee Convention

[12] A binding instrument of international law that confers a right to asylum in the broad sense being absent, we should turn to agreements that partially address the needs of protection seekers. The instrument of international law dealing most extensively with the matter is the “1951 Convention Relating to the Status of Refugees” (henceforth: Refugee Convention or RC).²⁶ The Refugee Convention is central to the asylum systems of all Member States, and to the Common European Asylum System as well. Articles 2-34 RC grant

all kinds of benefits (referred to below also as “secondary rights”), concerning such matters as education, gainful employment and the right not to be expelled to a state where the life or freedom of the alien would be threatened. Together, these provisions make up to a considerable extent the right to asylum in the broad sense defined above (number [10]).

Entitled to these secondary rights are “refugees”. Who is a refugee is defined in Article 1 of the Refugee Convention. According to the first clause of Article 1A(2), a refugee is any person who

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

Although fulfilling these requirements, an alien cannot invoke protection if one of the other provisions of Article 1 RC applies. The protection afforded by the Convention ceases when the alien is no longer a refugee (Article 1C). Excluded from refugee status (from entitlement to the benefits set out in Articles 2-34 RC) are persons who can turn to certain alternative sources of protection: to another state whose nationality the alien possesses (Article 1A(2) second clause),²⁷ or whose *de facto* nationality he possesses (Article 1E),²⁸ or to assistance from United Nations agencies (other than UNHCR, Article 1D). Finally, persons who have committed certain very serious crimes are excluded as well (Article 1F).

[13] The Refugee Convention refers to two limitations of the refugee definition – a temporal and a geographical one. The text of Article 1A(2) narrows its scope to “events occurring before 1 January 1951”. But according to Article I(1) of the 1967 Protocol of New York,²⁹ Article 1A(2) should be read as if these words were omitted. All Member States of the European Union are party to the 1967 Protocol;³⁰ the temporal limitation is therefore of no interest to us. The geographical limitation follows from Article 1B RC. According to this provision, Contracting States must make a declaration that specifies whether Article 1A(2) applies to persons who have well-founded fear of being persecuted due to “events occurring in Europe” only, or to persons having such fear due to “events in Europe or elsewhere”. All Member States chose the second option.³¹ References to the Refugee Convention below address the Convention as amended by the New York Protocol.

[14] The first and foremost condition for enjoying Convention benefits, then, is being a refugee as defined in Article 1 RC. Most Convention provisions

state additional requirements; first and foremost, refugees cannot (effectively) invoke Convention rights if they are not present on the territory of a Contracting State.³² But the Convention does not explicitly grant a right to presence or a right of entry into those states. Nor is such a right implicit to the Convention. The provision coming closest to it is Article 11:

“In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country”.

So, even seamen on board of ships flying the flag of a Contracting State are entitled to no more than “sympathetic consideration” to their establishment on the territory; that State is not even bound to allow them temporary admission.

The prohibitions of refoulement

[15] In the absence of a treaty obligation to provide for entry or condone presence, the matter is subject to the domestic law of the Member States. But the sovereign right to control the presence of aliens, among them refugees, is conditioned by the prohibitions of *refoulement*. “*Refoulement*” means removal of an alien to a state where he runs a certain risk of being submitted to certain human rights violations. Several treaty provisions specify when removal amounts to *refoulement*, and explicitly forbid removal in such cases – the so-called prohibitions of *refoulement*. Explicit prohibitions of *refoulement* are worded in Article 33(1) of the Refugee Convention:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”,

as well as in Article 3 of the Convention Against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (henceforth Convention Against Torture, or CAT):³³

“No State shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”³⁴

Further, certain international law norms prohibit *refoulement* implicitly. For the Member States of the European Union, the most important implicit prohibition of *refoulement* is Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth: European Convention of Human Rights, or ECHR), reading

“[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”³⁵

According to well established case law of the European Court of Human Rights,

“whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion”.³⁶

Another provision prohibiting indirect *refoulement* is to be found in the Covenant on Civil and Political Rights (henceforth also: Covenant or CCPR):³⁷

“[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

The Human Rights Committee stated that the provision prohibits *refoulement* for the first time in its General comment 20,³⁸ and affirmed it in a number of views.³⁹

[16] The implicit prohibitions of *refoulement* constitute by nature an open category. Other human rights than those mentioned above may also prohibit *refoulement*. The Strasbourg organs accepted that Article 2 ECHR, the right to life, implies a prohibition of *refoulement*.⁴⁰ The European Court further explicitly stated that Articles 5 and 6 ECHR might “exceptionally” contain prohibitions of *refoulement* as well.⁴¹ In academic writing other ECHR provisions have been mentioned,⁴² and Article 16(1) CAT has been suggested as a possible prohibition of *refoulement* too.⁴³ But neither the European Court of Human Rights nor the Committee against Torture has (yet) honoured appeal to these supposed prohibitions of *refoulement*.⁴⁴ In this book, I will restrict the discussion to the well-established prohibitions of *refoulement* – the Articles 33 RC, 7 CCPR, 3 ECHR and 3 CAT.

Other relevant human rights law

[17] Article 1 RC and the prohibitions of *refoulement* hence define who qualifies for protection. These prohibitions of *refoulement* afford protection in the narrow sense defined above – protection of aliens from expulsion to the state where they are in danger. Asylum or protection in the broad sense would entail a number of additional secondary rights. The only instrument of international law addressing such secondary rights of *in particular* persons in need of protection is the Refugee Convention. Thus, a refugee must, according to Article 4 RC, be treated “at least” as favourable as nationals, as regards his freedom

of religion and of religious education of his children. Protection seekers and asylum beneficiaries (refugees or not) may further invoke all kinds of international law provisions, including human rights law. But the freedom of religion or of education ex Article 10 ECHR or Article 2 of the First Protocol to the European Convention of Human Rights for asylum seekers and asylum beneficiaries is not different from the freedoms of other persons. Any protection under those provisions would not be on account of the danger threatening them abroad. Therefore, it falls outside the scope of asylum as defined above and hence outside the scope of “international asylum law”.

[18] Three sets of rules of general human rights law are nevertheless addressed in this study. First, rules on procedures. Upon a request for asylum, the approached state sorts out whether the alien qualifies for asylum in “asylum procedures”. Neither the Refugee Convention nor any other treaty explicitly addresses asylum procedures in particular. But several treaties do address procedural issues in general. Thus, Articles 6 ECHR, 14 CCPR and 16 RC entail a right of access to courts, and Articles 13 ECHR and 2(3) CCPR require an “effective remedy” for persons “whose rights and freedoms” under those instruments (such as the prohibitions on *refoulement*) have been violated. Article 13 CCPR, finally, states specific procedural guarantees on expulsion of “lawfully present aliens”. These provisions do not address in particular the need of protection because of a danger threatening the alien abroad. But their application to *refoulement* cases is informed by that need. Moreover, asylum procedures are of decisive importance for the possibility to exercise in an effective way any right to protection. Therefore, international law that conditions asylum procedures is addressed in this study.⁴⁵

Second, international law on detention. During the processing of claims for protection, states may impose restrictions on the freedom of movement of applicants that may amount to detention. Articles 9 CCPR and 5 ECHR set conditions on such detention, and address in particular detention in case of unauthorised entry; application of these provisions is informed by the particular circumstances of aliens who request asylum.⁴⁶

Third, rules on family unity laid down in Articles 17 and 23 CCPR and 8 ECHR. As many other provisions of human rights law, they may apply to any alien. Neither the circumstance that these provisions may block expulsion (or even warrant entry) of aliens, nor the assumption that claims concerning family unity may be of particular interest for persons in need of protection brings them within the scope of international asylum law. A partial discussion of the right to respect for family life is nevertheless warranted, as the particular

predicament of persons in need of protection does affect the application of the international law provisions on family life (see further Chapter 8.3).

Custom and principles

[19] Next to treaty law, “custom” and “principles recognised by civilised nations” are primary sources of international law (number [9]). For our purposes, these sources are of only limited relevance. In academic writing, it has been argued that the prohibition of *refoulement* is a rule of general or at least of regional customary law. Article 38(1)(b) of the ICJ Statute defines “international custom” as “evidence of a general practice, accepted as law”. According to Lauterpacht and Bethlehem, the required “generality” of practice can be inferred from the great number of states party to the Refugee Convention or (one of) the other instruments prohibiting *refoulement*; Convention Against Torture, the Covenant on Civil and Political Rights and the European Convention of Human Rights.⁴⁷ The customary rule or “principle of non-*refoulement*”, then, is not identical to these treaty obligations, but their greatest common denominator. Thus, the personal scope of this rule of custom could not exceed the scope of the prohibitions in treaty law. Next to obligations under those treaties, the rule of custom would therefore have no meaning.

Nevertheless, in one respect the customary prohibition of *refoulement* may be relevant for this study. The Community is not bound under international treaty law to observe the prohibitions of *refoulement*. International customary law does, however, work within the Community legal order. The relevance of the (alleged) customary prohibition of *refoulement* for European asylum law will be addressed under number [105].

As far as I know, neither in state practice nor in academic writing, have principles of international law on asylum been identified. But principles, especially the principle of effectiveness, do play a role in the interpretation of treaty law on asylum, and will be addressed accordingly (see par. 6.2.2).

Concluding remarks

[20] The Refugee Convention and the prohibitions of *refoulement*, then, are the main constituents of international asylum law. Together, the rights conferred in the Refugee Convention bestow, to a considerable degree, asylum in the broad sense (cf. number [10]), and hence offer protection in the broad sense suggested above. Article 3 ECHR, 3 CAT and 7 CCPR have meaning next to the Refugee Convention, as they offer protection to persons not entitled to Refugee Convention protection. For example, Article 33 RC restricts

the application to human right violations inflicted “on account of [...] race, religion, nationality, membership of a particular social group or political opinion”- a condition absent in the other prohibitions of *refoulement*. Also, persons who committed serious crimes (as meant in Article 1F RC, cf. number [12]) are excluded from refugee protection, but they may still be entitled to protection from *refoulement* offered by Articles 7 CCPR, 3 CAT and 3 ECHR. In other respects, however, the protection offered by the last mentioned provisions is more restricted. It concerns only protection from expulsion, not entitlement to those other benefits laid down in the Refugee Convention. In fact, most Member States do grant certain secondary rights to persons who do not qualify for refugee status but who cannot be removed because Article 3 CAT, 3 ECHR or 7 CCPR applies – so called “subsidiary forms of protection”⁴⁸ -, but there is no indication that they regard the grant of secondary rights to subsidiary protection beneficiaries as an obligation rather than a discretionary competence.⁴⁹

Other human rights law is addressed only if its application to aliens in need of asylum is strongly informed by their need of protection. This holds true for international law on procedures, on detention and on family unity. As these rules do not specifically address asylum, I will not label them as “international asylum law”.

1.4.2 Interpretation

1.4.2.1 The Vienna Convention on the Law of Treaties

[21] The meaning of treaty law must be established autonomously from domestic law, and interpretation rules can therefore be found only in international law.⁵⁰ Two means of interpretation relevant for the present study are identified by Article 38(d) of the Statute of the International Court of Justice: “judicial decisions and the teachings of the most highly qualified publicists of the various nations”. The Statute labels them as “subsidiary means for the determination of the rules of law”, which implies that they are not sources of law, but rather serve as means to clarify the obligations flowing from treaty law, customs and principles.

For the interpretation of treaty law, Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (henceforth also: Vienna Treaty Convention or VTC) provide for interpretation rules.⁵¹ In their quality as treaty law, they apply only to States party to the Vienna Treaty Convention, i.e. to

only 20 out of the 25 Member States,⁵² and only to treaties concluded after the entry into force of the Convention in 1980,⁵³ which excludes application to the Refugee Convention, the European Convention of Human Rights and the Covenant on Civil and Political Rights. But the interpretation rules in Articles 31, 32 and 33 VTC are generally seen as a codification of customary law.⁵⁴ States not party to the Vienna Treaty Convention are therefore bound to apply identical rules.⁵⁵ Hence, Articles 31, 32 and 33 VTC can be safely applied to all instruments of international asylum law.

[22] Article 31 and 32 VTC list the means of interpretation. Article 31 runs as follows:

“General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.”

[23] First of all, a treaty should be interpreted “in good faith”. As interpretation by Contracting States is part of the performance under the concerned treaty, assessment of its meaning should be in accordance with the principle *pacta sunt servanda*. Hence, if interpretation of a provision in accordance with text, object and purpose and other means mentioned in Article 31 VTC leads to manifestly absurd or unreasonable results when applying the provision, another interpretation should be sought.⁵⁶ The “general rule of interpretation”

further states that interpretation should be based on text, object and purpose, the context, including agreements and instruments concluded “in connection” with the treaty, as well as later agreements among and state practice of the Contracting States, and relevant rules of international law.

[24] Should we assume that a strict hierarchical order prevails among these various means, in the sense that context, object and purpose should be addressed only in case the ordinary meaning does not yield a clear result?⁵⁷ The text of Article 31(1) does not imply a strict distinction; rather, it suggests that the ordinary meaning can be established only within the context and in the light of its object and purpose. Elias points out that the four main elements mentioned in Article 31(1) – (3) VTC (i.e. ordinary meaning, context, object and purpose, subsequent agreements and practice between the states party to the treaty and applicable general rules of international law),

“are not to be regarded as hierarchical, but are to be applied as an integrated or interdependent whole. It contains a statement of the elements in a general rule, not series of rules. The use of the word “context” in all three paragraphs of the Article is designed to emphasize this integrated scheme”.⁵⁸

The case law by the International Court of Justice confirms this approach:

“The rule of interpretation according to the natural and ordinary meaning of the words employed “is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.”⁵⁹

Thus, the interpretation does not stop when a meaning compatible with the wording is reached: this meaning has to be put against the background of the object and purpose of the treaty concerned. The International Court of Justice further has clarified that

“[...] in accordance with customary international law, reflected in article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.”⁶⁰

So, emphasis should be put on the text of the treaty. This does not imply a preference for the ordinary meaning above interpretation to object and pur-

pose, as object and purpose are mostly explicitly laid down in treaties (for example, in the preamble). Indeed it is hard to see how a term can be attributed any specific meaning at all out of its context, or what the ordinary meaning is.⁶¹ In fact, it may often work the other way: a provision whose terms have a very clear ordinary meaning, may turn out to have an unclear meaning if read in its context.⁶² The very determination of the clarity of the result attained by reading a provision to its ordinary meaning involves the context as well as the object and purpose of the provision.

[25] Article 32 introduces “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”. These means are “supplementary”, as, according to Article 32,

- “Recourse may be had to supplementary means of interpretation [...] in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
- a. leaves the meaning ambiguous or obscure; or
 - b. leads to a result which is manifestly absurd or unreasonable.”

It follows that in two instances recourse may be had to supplementary means. First, in order to confirm an interpretation arrived at by application of the “general rule” of Article 31 VTC. Second, if no satisfying result has been reached in that way (application of the general rule led to “ambiguous”, “obscure”, “manifestly absurd” or “unreasonable results”), to determine the meaning of the concerned treaty provision. In both situations, the means are “supplementary” in the sense that the general rule must be applied first. But it should be observed that in the second situation the means are not supplementary in the sense that they may merely confirm a reading identified by means of Article 31 VTC.⁶³

[26] Article 32 VTC mentions one supplementary means of interpretation “in particular”: the *travaux préparatoires* or preparatory works to the treaty concerned. Their value depends on various factors. An important one is, obviously, the availability of the material. The preparatory works for the Refugee Convention, the Covenant on Civil and Political Rights, the Convention against Torture and the European Convention on Human are all accessible. This condition met, the preparatory works can be invoked against states that acceded to the treaty (but did not take part in its preparation).⁶⁴ Another important factor for their value for interpretation is the authenticity of the material.⁶⁵ Obviously, a statement acclaimed by the preparatory conference has far more value than a view expressed by an individual representative.

But even when the preparatory works express in a clear way the intentions of the Contracting States, they are still only a supplementary means. In its Advisory Opinion on the *Namibia* case, the International Court of Justice observed:

“Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant [...] were not static, but were by definition evolutionary [...]. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of the law [...]. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”⁶⁶

Especially the preparatory works to the Refugee Convention are frequently invoked in academic literature on international asylum law. When addressing this material that dates back more than half a century, we have to take due account of the observation by the International Court of Justice in the *Namibia* case quoted above. Circumstances have changed; moreover, the 1967 New York Protocol to the Refugee Convention had profound influence on the application of the Refugee Convention’s provisions (cf. Article 31(3)(a) VTC). This is not to discard the value of the preparatory works as a supplementary means, but calls for caution when basing interpretation of the Convention upon them.

[27] The Refugee Convention, the Covenant on Civil and Political Rights, the Convention Against Torture as well as the European Convention on Human Rights are laid down in more than one language version, which are equally authentic.⁶⁷ Each of those texts has legal force, and their terms are presumed to have the same meaning; in principle, the rules laid down in Articles 31 and 32 apply.⁶⁸ Thus, if the meaning of a provision is unclear in one authentic text, the terms of another text may be clearer. If however comparison of authentic texts discloses a conflict that the application of Articles 31 and 32 VTC does not solve, “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.⁶⁹

[28] In sum, the Vienna Convention on the law of Treaties as well as the decisions by the International Court of Justice support the distinction between the

“general means of interpretation” on the one hand and the “supplementary means” on the other. They do not indicate a hierarchical distinction among the general means of interpretation, mentioned in Article 31 VTC.

The material discussed above allows for three observations on interpretation. First, “the primary necessity of interpreting an instrument in accordance with the intentions of the parties”.⁷⁰ This principle explains the distinction between general means and supplementary means: the contracting parties did not express consent to be bound as to the latter. It follows, secondly, that “interpretation must be based above all upon the text of the treaty”,⁷¹ including context and object and purpose as laid down in the treaty: they express the consensus of the contracting parties. Third, interpretation must be consistent with the entire legal system at the time of the interpretation.

1.4.2.2 Treaty monitoring bodies

[29] Any interpreter of a treaty should apply the means of interpretation discussed above, be it a state, a scholar, or a monitoring body established by the relevant treaties. Views issued by the latter bodies, however, may have particular significance for the interpretation, by virtue of an arrangement to that extent established by those treaties. As much of the following chapters is devoted to analysis of views of those bodies, the legal significance of these views for interpretation of the instruments of international asylum law will be assessed at some length.

UNHCR and ExCom

[30] The Refugee Convention does not establish its own monitoring body. The International Court of Justice is competent to rule on the settlement of disputes concerning the content of the Refugee Convention,⁷² but it has never been called upon to do so as only states, not individuals or (international) organisations can bring cases before it.⁷³ Interpretation of the Convention rests primarily with the states party to it.

[31] Apart from state practice, there are two important sources for the interpretation of the Refugee Convention. Firstly, opinions issued by the United Nations High Commissioner for Refugees.⁷⁴ According to Article 35(1) of the Refugee Convention, states party to it

“undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, [...], in the exercise of its functions, and shall

in particular facilitate its duty of supervising the application of the provisions of this Convention”.

The explicit recognition of the UNHCR as “supervisor” over the application of the Refugee Convention entails that the Commissioner’s opinions are relevant for interpretation. But the duty to supervise application does not entail the power to issue binding decisions on interpretation. Nor do the terms “undertake to cooperate” imply so. In contrast, the International Court of Justice can “settle” disputes. UNHCR’s opinions are therefore a subsidiary means of interpretation, their relevance depending on the quality of the reasoning.⁷⁵

[32] The second source is the Conclusions by the Executive Committee of the programme of the High Commissioner (henceforth: ExCom).⁷⁶ This Committee consists of representatives of the Member States of the United Nations Organisation. Its conclusions are usually adopted in unanimity, but as neither the Refugee Convention nor any other treaty has conferred law-making competence to ExCom, the Conclusions are in and of themselves not binding. But to a certain extent, the Conclusions are indicative of the consent of the states party to the Convention (cf. Article 31(3)(a) VTC).

The *UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (henceforth: UNHCR Handbook) has a special position.⁷⁷ ExCom requested⁷⁸ but did not adopt the Handbook. Consequently, the Handbook does not (even) share the rank of the ExCom conclusions. But according to the Handbook itself,

“practice of States is taken into account as are exchanges of views between the Office and the competent authorities of Contracting States, and the literature devoted to the subject over the last quarter of a century”.⁷⁹

This reference to state practice suggests that the Handbook reflects “subsequent state practice” within the meaning of Article 31(3) of the Vienna Treaty Convention. But unfortunately, the UNHCR Handbook does not make explicit which parts precisely do reflect state practice, and which parts merely reflect the view of the High Commissioner. At any rate the Member States of the European Union do not accept the entire Handbook as codification of state practice.⁸⁰ In summary, the UNHCR Handbook is only a subsidiary means of interpretation of the Refugee Convention in the sense of Article 38(1)(d) ICJ Statute, albeit an important one.

The Human Rights Committee

[33] The Human Rights Committee (hereafter also: HRC) monitors obser-

vance of CCPR obligations.⁸¹ According to Article 41(4) CCPR it can transmit such general comments to the state parties as it deems appropriate. The Optional Protocol to the CCPR (henceforth also: OP CCPR) provides for the right to lodge complaints with this Committee about alleged non-observance of those obligations by states party to both instruments.⁸² The Committee then may consider the case and issue its “views” on the complaint.⁸³

The legal status of these views is a matter of controversy. According to Brownlie, the findings of monitoring bodies may be described as “quasi-judicial decisions” if they meet two conditions.⁸⁴ First, the finding should be binding, and not merely a recommendation; second, the monitoring body should apply rules of law to facts established by due process. The Human Rights Committee itself states its views bind the states concerned, hence fulfil the first condition:

“Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to *determine* whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to its Views [emphasis added].”⁸⁵

But neither the Covenant nor the Optional Protocol justifies this assertion. They do not confer on the Committee the competence to “determine” whether or not the Covenant has been violated, but to issue “views”, a term that suggests non-binding rather than binding rulings.⁸⁶ In the absence of an explicit treaty provision to the latter effect (or the establishing of some organ supervising the implementation of those views), there is no reason to assume that the Contracting States restricted their sovereignty in this respect. The obligation to guarantee the rights and freedoms in Article 2 CCPR in itself does not have any bearings on the Committee’s competence. And there is no further indication that the states party to the Covenant and the Optional Protocol regard the views as binding.⁸⁷

[34] Some authors state that views of the Committee qualify as quasi-judgments by virtue of guarantees of due process in the Covenant and the Optional Protocol, rather than as political decisions,⁸⁸ and hence fulfil the second condition mentioned by Brownlie. But this quasi-judiciary status is questionable, as the Committee rules on procedures lack some very basic guarantees of due

process. Although the members of the Committee are elected and serve in their personal capacity,⁸⁹ the Covenant does not stipulate that they are independent from their governments – and the membership of the Human Rights Committee has included senior government representatives, members of parliament and so on.⁹⁰ Sessions are held in private.⁹¹ Finally, many views are not restricted to the finding whether or not a violation of a Covenant right has occurred. The Committee may comment on states' "obligations" as to amend legislation,⁹² or even offer recommendations on the interpretation of other treaties.⁹³ MacGoldrick points out that the very ambiguity of the term "views" allows the Human Rights Committee to venture into such issues.⁹⁴

The views of the Committee are therefore not binding, and cannot be regarded as quasi-judicial decisions. They should be categorised as subsidiary means for establishing the meaning of obligations under the Covenant, their value depending upon the quality of the reasoning; interpretation at variance with the Committee's view need explicit foundation.

The Committee against Torture

[35] The observance of the Convention Against Torture is monitored by the Committee against Torture (henceforth also: CaT). Article 22 CAT establishes a facultative right of complaint: states can acknowledge the Committee's competence "to receive and consider" complaints of violations, and to issue "views" thereupon.⁹⁵ Here, a similar issue arises as with regard to the views of the Human Rights Committee discussed above.

According to the Committee against Torture itself, its views are binding pursuant to Article 22 CAT.⁹⁶ The ordinary meaning of the term "view" applied in this provision however suggests otherwise.⁹⁷ In contrast, Article 30(1) CAT addresses the "settlement" of disputes on interpretation or application by arbitration or by "referring" the matter to the International Court of Justice.⁹⁸ Further, there is no indication that states conceive of the Committee's views as binding case law. And as in the case of the Human Rights Committee, the procedure before the Committee against Torture lacks basic guarantees. Those guarantees are mostly laid down in the Rules of Procedures.⁹⁹ The procedure is not public,¹⁰⁰ and the rules for challenge and exemption of Committee members are incomplete. Thus, the Committee must exclude a member from the examination of a complaint if that member has some personal interest in it, participated in the decision-making or is a national of an involved state.¹⁰¹ The rules are silent, however, on the question of whether the applicant can challenge the impartiality of Committee members. Rules on forced dismissal are absent altogether. Consequently, independence and impartiality of the CAT are

guaranteed only in a limited way. The Committee consists of 10 members, but if a quorum of six is present it can decide on a complaint.¹⁰² The “communications” wherein the Committee lays down its views do not indicate the names or even the number of members sustaining or rejecting it.

Whereas the views of the Committee are therefore not binding and cannot be regarded as quasi-judicial decisions, denying them any relevance would also be contrary to Article 22 CAT. The Committee’s views on interpreting an application of the Convention should therefore be taken into account as subsidiary means of interpretation; divergent readings need explicit foundation.¹⁰³

The Council of Europe

[36] The European Court of Human Rights monitors observance of the European Convention of Human Rights. It can rule on complaints of violations; Article 46 ECHR accords binding force to its final judgements. Do these judgements also have a binding effect for parties not involved in a particular case? The Convention does not explicitly confer a general power to the European Court of Human Rights to authentically interpret the Convention.¹⁰⁴ But pursuant to Article 46 ECHR, the European Court bears the ultimate responsibility in interpreting the Convention, not the involved state (or states). As precedents, the Court’s decisions and judgements exert influence surpassing the particular cases. As the Court itself observed:

“[t]he Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties”.¹⁰⁵

So it appears that the Court itself views its judgements pretty much as authentic interpretations of the Convention. It refers to judgements reflecting well-established case law as “authorities”;¹⁰⁶ “cogent reasons” are necessary to change a well-established jurisprudential line.¹⁰⁷ Arguably, state practice confirms this status of the Court’s decisions. As Lawson observes, no Contracting State could, since the *Soering* judgement, assume that its obligations under Article 3 ECHR cannot be involved in expulsion cases.¹⁰⁸

The discussion of obligations under the European Convention of Human Rights below is based upon the assumption that interpretations of Convention obligations developed in the case law of the European Courts of Human Rights make part of the states’ obligations under that Convention.¹⁰⁹ Obviously, not each and every individual judgement has the same binding effect on states not involved in the dispute. But rules worded in a way that make them fit for

application in other cases have, such as the prohibition of *refoulement* under Article 3 ECHR (cf. number [15]).¹¹⁰

[37] As to the particularities of the Strasbourg procedure, States as well as individuals can lodge claims of alleged violations of rights and freedoms protected by the Convention to the Court.¹¹¹ In each case the Court first takes a “decision” on the admissibility of the claim.¹¹² If the complaint is admissible, the Court rules on the merits in a “judgement”. The Convention provides for a form of internal appeal: the parties to a case can request that the case be referred to the “Grand Chamber”.¹¹³

Below, occasional reference is made to the European Commission of Human Rights. This institution was involved in the adjudication of violations of Convention rights before 1 November 1998. Any complaint was first reviewed by the Commission, who laid down its view on the matter in a “decision”. The Commission as well as the involved state (but not the individual) could thereupon bring the case before the Court. If they did not, the Commission’s decision was final.¹¹⁴

European Law

[38] A final issue to be addressed are the views expressed in European asylum legislation produced by the European Community, or in the so called asylum *acquis* predating this legislation (see paragraph 1.5.1 below). Undoubtedly, both this European asylum legislation,¹¹⁵ as well as this pre-Amsterdam *acquis*¹¹⁶ are valuable sources for the interpretation to the extent that they are indicative of state practice in Europe (cf. Article 31(3)(b) VTC). Moreover, European asylum law may very well influence the content of international asylum law (cf. number [730]).

Nevertheless, I will *not* take European asylum law or the pre-Amsterdam *acquis* into account when assessing the meaning of international asylum law. To begin with, instruments of European asylum law as well as the pre-Amsterdam *acquis* express views of organs of the European Community and of the European Union. The Member States were involved in their adoption as constituents of the Council, thus not in their capacity as Contracting states of the instruments of international law as Article 31(3)(b) VTC requires. Furthermore, in the present study, rules of international law serve as a touchstone for assessing the content of relevant European asylum legislation. If the latter legislation (and the *acquis* on which it, partially, builds) would also serve for interpretation of international law, we would at least partially assess the compatibility of European law with itself. For example, both the *acquis* as well

as Community law express the view that the exception of the safe third country may be applied without previous assessment of the risk of persecution or harm in the country of origin (cf. paragraph 7.5). May we assume on that basis that the prohibitions of *refoulement* do not require such assessment? I think it is clearer and more secure to keep international and European asylum law separated. Obviously, interpretation informed by state practice always and necessarily suffers from this somewhat circular kind of reasoning. In the case of European asylum law, however, there is the opportunity to avoid it: European asylum law was made over the last few years, thus well after international asylum law became well-established.

1.4.2.3 Concluding remarks

[39] Above, the means and rules most relevant for the interpretation of international asylum law were identified. It was observed that no strict hierarchy reigns among the “primary means of interpretation” listed in Article 31 VTC. Even the opposition between the these primary means and the supplementary ones may be diffuse, as the latter may determine the meaning of a treaty provision in the absence of primary means leading to a clear result. As a consequence, application of the various means of interpretation may lead to contrary results.

In practice, the degree of uncertainty is not as great as it may seem, however, due to differences in the circumstances. In many cases one means of interpretation yields far more explicit results than another does. Thus, the ordinary meaning of a treaty provision will often lead to far more clear-cut results than its object and purpose. Moreover, the monitoring bodies may offer guidance. The latter applies especially to the European Convention of Human Rights.

Notwithstanding the guidance offered by the various monitoring bodies, various means of interpretation may give off conflicting signals. Interpretation then comes down to a balancing of different options. In the absence of a clear hierarchical order among the means of interpretation, the choice in such cases must be motivated as solidly as possible.

1.5 European asylum law

[40] European asylum law discussed in this book consists of the provisions of the Treaty on European Community as amended by the Treaty of Amsterdam in 1999, and the legislation based on it. In par 1.5.2, the sources and some features

of Community law that distinguish it from international law are discussed. In paragraph 1.5.3, the Community measures on asylum that will be discussed in the next Chapters are identified. In paragraph 1.5.4, I address the decision-making procedures and the Community institutions involved in it and in paragraph 1.5.5, the method and means of interpretation that apply to Community law.

Present European asylum law is partially shaped by co-operation on asylum matters that predates the Treaty of Amsterdam. Moreover, parts of the pre-Amsterdam *acquis* may serve as means of interpretation of the present legislation. Therefore, in paragraph 1.5.1 I give a brief sketch of the development of European co-operation on asylum matters, including developments that took place since 1999 – the conclusion of the Treaty of Nice and of the Treaty establishing a Constitution for Europe.¹¹⁷

1.5.1 The genesis of European asylum law

Before the Treaty of Amsterdam

[41] Asylum entered the field of activity of the European Community as a side effect of the ambition to create the freedom of movement of persons within the Community. Before 1993, the Treaty on European Economic Community did not make any mention of asylum, immigration or even human rights. Rather, its main objective was the integration of the economies of the Member States. An “internal market” comprising “an area without internal frontiers” was to be created.¹¹⁸ This implied shifting controls from the internal borders (borders between the Member States of the Community) to the external borders of the Community. Decisions on the entry of third-country nationals (persons who do not possess the nationality of one of the Member States), including persons in need of protection, would hence become a matter of common concern.¹¹⁹ Thus, the creation of the “internal market” would require harmonisation of visas, immigration policy and asylum law.

[42] For a time, the Member States of the Community were divided on the matter. A number of them were unwilling to give up control on the entry of third country nationals. The abolition of internal border controls of persons did not take place,¹²⁰ and border controls as well as the connected issue of asylum stayed for the moment out of the scope of Community law.

The Member States that wanted to achieve the abolition of internal borders sought means to do so outside the scope of Community law. In 1985 they concluded the Schengen Agreement, a treaty under international law.¹²¹ This

Agreement contained no binding provisions on third country nationals, but offered a framework for adopting measures compensating for the abolition of internal border control, such as measures against illegal entry and harmonisation of rules on visas.¹²² Such measures were laid down in the Schengen Implementing Agreement, concluded in 1990.¹²³ The Schengen Agreement, the Schengen Implementing Agreement and a number of connected measures make up the so-called Schengen *acquis*. Gradually, all Member States except for the United Kingdom and Ireland acceded, as well as the non-Member States Norway and Iceland (which maintained a passport union with the Member States Denmark, Sweden and Finland).

[43] The Schengen Implementation Agreement mainly dealt with border controls and visa's , but also contained a number of provisions on asylum.¹²⁴ These however were eventually overhauled by the Dublin Convention.¹²⁵ This Convention (also an agreement under international law) was the product of the "European Political Co-operation", conducted by the Council of the Ministers for Immigration of the European Economic Community. The Dublin Convention was concluded in 1990 among all Member States of the Community, including the UK and Ireland (the position of the non-Member States Iceland and Norway was catered for by yet another treaty)¹²⁶ and contained binding provisions that concern asylum seekers.¹²⁷

The Dublin Convention established a system for determining "responsibility" for examination of asylum claims. After the abolition of border controls, asylum seekers who had entered the Community could easily travel to the state they preferred, or lodge applications in several Member States. The Dublin Convention was to put an end to this so called "asylum shopping". Henceforth, a request for asylum would be examined by only one Member State, the one responsible according to the Dublin Convention rules. If an asylum seeker appeared in a non-responsible state, the responsible state would take care of him. As to the application of asylum law, the Convention only prescribed that it should be "in accordance with its national law and its international obligations".¹²⁸ Hence, the actual examination of the request, rules on procedures, reception facilities and so on were all left to domestic law. A Committee was established that could and did issue rules on the application of the Dublin Convention.¹²⁹

[44] The European Political Co-operation endeavoured to issue measures on (among other things) asylum. In 1992 four "resolutions" were issued, which dealt with manifestly unfounded applications for asylum, the concept of safe

third countries, the concept of safe third countries of origin and the expulsion of illegal third country nationals¹³⁰. These “London Resolutions” however lacked binding force.¹³¹

Thus, through means of international law the Member States had reached results currently not attainable within the framework of Community law. But for a number of reasons, this co-operation under international law proved to be insufficient for the posed aims. Not all arrangements worked as smoothly as desired, asylum shopping continued and as long as the asylum policies and legislation of the Member States differed considerably, this phenomenon was likely to continue.¹³² Non-binding instruments such as the London Resolutions could not bring about the desired level of approximation of domestic law.

[45] A cautious attempt to bring border and immigration matters closer within the ambit of Community law was made in 1992, when the Member States concluded the Treaty of Maastricht (henceforth also: ToM).¹³³ This Treaty established the European Union that supplemented the Community and consisted of the same Member States.

The European Union was a new legal structure consisting of three parts or “pillars”. The first pillar was the European Community as established by the Treaty on European Community, with its own powers and its own specific legal order. The other two pillars concerned “security and foreign policy” and “justice and home affairs”. Though the European Union employed the same institutional framework as the Community, the second and third pillar law lacked the characteristics of Community law.

The objective of the third pillar was achieving the objective of the European Union, “in particular the free movement of persons”.¹³⁴ Article K.1 ToM declared asylum as well as control on crossing external borders by persons, immigration, and entry, residence and family reunification of third country nationals as “matters of common interest.” On these matters the Council could adopt measures by unanimity voting. Until the entry into force of the Treaty of Amsterdam in 1999, the Council adopted two “joint positions”, several “joint actions” and decisions as well as some decisions *sui generis*.¹³⁵ The only one of direct relevance for the present study is the “*Joint position of 4 March 1996 on a harmonized application of the definition of the term “refugee” in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees*”.¹³⁶ The binding force of those actions and positions was little, if it existed at all.¹³⁷

[46] The output of the intergovernmental decision making under the Third Pillar was, at least as far as asylum is concerned, not impressive. Lengthy pro-

cedures and the need for unanimity made decision making under the third pillar ineffective.¹³⁸ Apart from the lack of effectiveness, the absence of democratic and judicial review was felt as another shortcoming of the Maastricht system.¹³⁹ The deficiencies that had tainted the intergovernmental approach to a large extent subsisted in the co-operation under the Third Pillar.

The Treaty of Amsterdam

[47] In 1997 the Member States concluded the Treaty of Amsterdam, that amended both the Treaty on European Union as well as the Treaty on European Community. The Treaty of Amsterdam moved the whole area of asylum and immigration from the Union's third pillar to the first pillar, hence to the Treaty on European Community. It is the legislation based on this Treaty that I discuss in the Chapters 4 to 9.

The provisions relevant for Community powers on asylum and immigration were placed in Title IV of Part III of the Treaty on European Community as amended by the Treaty of Amsterdam (Articles 61-69 TEC after consolidation; henceforth also referred to as: Title IV). Article 63(3)(a) TEC made the Community competent to adopt "measures on immigration policy" concerning "conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits". Article 63(1) and (2) TEC moreover mentioned a number of asylum matters on which the Community should issue legislation (see further paragraph 3.3).

[48] Although the scope of the new Community competencies was considerable, two features reveal a certain reticence. First, as Kuijper points out, on all the mentioned issues either the Council had adopted measures (the Dublin Convention, the London Resolutions and the Joint Position), or proposals for third pillar measures were pending before the Council (with the sole exception of the right of residence in other Member States, required by Article 63(4) TEC).¹⁴⁰ Hence, Article 63 provided a legal basis in Community law for already existing or drafted measures, rather than envisaging a new, comprehensive approach to the issue of asylum in the European Union. Secondly, the scope of most measures on asylum is restricted to "minimum standards".¹⁴¹ This entails that the Member States would retain residual power to legislate on the matter (see paragraph 3.4). This once again reflected the reluctance to completely hand over powers on asylum and immigration matters.

[49] Article 63 required the adoption of measures on a number of asylum issues within five years after the entry into force of the Treaty of Amsterdam,

i.e. before 1 May 2004.¹⁴² The Council could easily have fulfilled its obligation by adopting or re-adopting drafted or existing measures on asylum, as the London Resolutions and the Joint Position on the refugee definition. This, in fact, was indeed very much the core of the Strategy Paper on implementation of Title IV issued by the Austrian presidency in 1998.¹⁴³ But eventually, the European Council¹⁴⁴ stated more ambitious aims in the Conclusions of its meeting in Tampere in 1999.¹⁴⁵

The Tampere Conclusions have exerted a profound influence on shape and content of European asylum law.¹⁴⁶ To begin with, the European Council defined asylum policy as an independent objective, no longer as a mere flanking measure to the establishment of the freedom of movement for Union citizens.¹⁴⁷ Further, asylum measures should not be a bundle of independent rules on isolated topics, but form a whole: the Common European Asylum System (henceforth also: CEAS). This CEAS is, according to the Tampere Conclusions, to be established in two phases. In the short term (that is, within the five-year period set by the Treaty of Amsterdam) it should include

“a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection [...]”,

and as to the second phase,

[i]n the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.”¹⁴⁸

Thus, the European Council also formulated material standards for the measures to be adopted: the determination of the state responsible for an asylum request should be clear and workable, procedures “fair and efficient”. Overall, the Tampere Conclusions express strong commitment to human rights obligations under international law. The objective encompasses full commitment to obligations under the Refugee Convention and the relevant human rights treaties, and establishment of the CEAS is based on “absolute respect for the right to seek asylum”, and “on the full and inclusive application of the Geneva Convention, thus [...] maintaining the principle of *non-refoulement*.”¹⁴⁹

[50] Hence, the Tampere Conclusions made the objective of Community measures on asylum concrete, urged for coherence among them and insisted

on compliance with human rights standards. These facets exerted their influence on asylum measures as the Commission took the Tampere Conclusions as a starting point. The Council reinforced this view on European asylum law in the conclusions of later meetings¹⁵⁰ and, moreover, in each asylum instrument successively adopted.¹⁵¹

As to the order of adoption of the required measures, the Tampere conclusions referred¹⁵² to the (previously adopted) Vienna Action Plan.¹⁵³ But in fact, the order of adoption proved to be dictated rather by political feasibility. Most conspicuously, the measure on procedures was called for in the Vienna Action plan within two years, but was not yet adopted in July 2005. Still, the Vienna Action Plan priority list has had important consequences for the content of European asylum law. Legislation on peripheral issues (temporary protection, reception standards) was adopted before the core issues of asylum law (definition of beneficiaries of refugee and subsidiary protection status, the definition of the content of those statuses and the rules on procedures) were decided on. This odd order of adoption left its mark on the content of European asylum law, and partially explains some of the inconsistencies in the Common European Asylum System (see further Chapter 4).

[51] In summary, the Treaty of Amsterdam finally moved asylum policy from the intergovernmental co-operation among the Member States into the Community legal order. Its arrangements on asylum bear the marks of a compromise. According to Protocols adopted together with the Treaty of Amsterdam, the United Kingdom and Ireland retained their special position – they can partake in asylum measures at will; furthermore, European asylum legislation does not at all apply to Denmark (see further paragraph 3.5). Further, decision making and other constitutional arrangements show some peculiarities that can be traced back to the intergovernmental origins of the policy area – for example, measures on asylum are to be adopted by unanimity, and Member States could issue proposals – both rare requirements in Community law.¹⁵⁴ And the choice of subject matter appears to be inspired by the previously developed asylum *acquis*. But the European Council of Tampere formulated quite ambitious objectives for the asylum legislation that was to be adopted in its Tampere Conclusions – a Common European Asylum System was to be established that would, ultimately, encompass “a common asylum procedure” and “a uniform status for those who are granted asylum, valid throughout the Union.”

The Treaty of Nice

[52] Already before the entry into force of the Treaty of Amsterdam, the

Member States had started negotiations on yet another treaty that should amend both the Treaty on European Community as well as the Treaty on European Union. In 2000 the Member States concluded the Treaty of Nice.¹⁵⁵ As to Community legislation on asylum, the Treaty of Nice brought only minor changes. It stipulated that measures on asylum would be adopted by majority voting, “provided that the Council has previously adopted [...] Community legislation defining the common rules and basic principles governing these issues”.¹⁵⁶ Hence, new legislation amending or replacing the presently adopted first generation of European asylum law can be adopted far more easily.

Of greater relevance for present European law was the proclamation of the “Charter of Fundamental Rights of the European Union” by the Nice European Council.¹⁵⁷ It conferred *inter alia* a “right of non-*refoulement*” and even a “right to asylum.”¹⁵⁸ This Charter did not make part of the treaty of Nice, and its legal status was unclear.¹⁵⁹

The Constitution for Europe

[53] The question of institutional reform was taken up by the Treaty establishing a Constitution for Europe, amending both the Treaty on European Union as well as the Treaty on European Community. It was concluded on 29 October 2004 and will enter into force after ratification by all Member States.¹⁶⁰

The Constitution for Europe (henceforth also: Constitution or CfE) merges the European Community and the European Union into the “European Union”, or the “Union”. As to asylum, the Constitution brings important modifications to the scope of competencies. Incorporating the policy objectives laid down in the Tampere Conclusions, it calls for the establishment of a “Common European Asylum System.” Further, instead of “minimum standards”, a “uniform status” for asylum as well as subsidiary protection is called for, and “common procedures” for the grant of those statuses.¹⁶¹ These competencies are backed up by the general obligation to develop a “common policy on asylum and temporary protection”. All asylum related measures are to be adopted by the qualified majority voting rule. Further, the provisions of the Charter of Fundamental Rights make part of the Constitution. Hence, the provisions on non-*refoulement* and on the right to asylum would rank as Community or rather, as Union law. But in one respect, the Constitution does not bring change: the United Kingdom, Ireland and Denmark retain their special position according to the relevant protocols attached to the new Treaty.¹⁶²

Concluding remarks

[54] From the Single European Act to the Constitution, a steady development

towards ever closer co-operation among the Member States on asylum matters is visible. Starting as a mere side effect of the gradual abolition of obstacles to the fundamental freedoms, asylum became an area of European law in its own right - the Constitution for Europe even encompasses a "right to asylum". From the point of view of the Constitution, the history of co-operation in asylum matters can be viewed as a development from intergovernmental decision making in the Schengen framework to full-fledged Community law. The Treaty of Amsterdam then presents a transitional stage. Indeed, many commentators point out the intergovernmental traits of Title IV.¹⁶³ But these peculiarities should not obscure that present day European asylum law is Community law, with the legal effects of Community law and subject to judicial supervision by the Court of Justice.

The Treaty basis for current European asylum legislation is Title IV of the Treaty on European Community. It will be replaced by the Constitution after ratification. Therefore, I will address the Constitution provisions on asylum in Chapter 3 next to Title IV TEC as the future basis for powers on asylum. The content of the Charter as far as it is relevant for asylum legislation will be addressed in Chapter 2.3.

1.5.2 Features of Community law

[55] From the perspective of international law, the European Community is an international organisation established by the 25 states party to the Treaty on European Community (the "Member States"). But although established by an instrument of international law, the Community presents "a new legal order", a legal order *sui generis*, both different as well as independent from international law.¹⁶⁴ In order to distinguish this special character of Community law from common international law, it has been labelled as "supranational". In the present paragraph I briefly introduce the main features of this supranational law, as far as relevant for this study, and then the instruments of Community law (also: European law) relevant for asylum.

Basic tenets

[56] The subjects of Community law are, next to the Community institutions, the Member States as well as individuals. On what kind of Community law provisions individuals can rely, and under which conditions, will be discussed below (number [58]). Presently I address the relationship between Community law and the Member States.

This relationship is shaped by three tenets. Firstly, the principle of “supremacy” of Community law. It entails that all Community law has precedence over all domestic law. This means that Community law applies in the Member States on its own terms, not subject to conditions set out by domestic law.¹⁶⁵ It also means that domestic law contrary to primary or secondary Community law does not apply.

Secondly, the principle of loyal co-operation. According to Article 10 TEC “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks”.

The Article addresses not only the Member States as such, but also the organs of those states – the government, the judiciary, government agencies, and so on. The impact of the principle is particularly manifest in connection with the tenets of direct effect (see paragraph 9.2) and the obligation of the Member States to provide for remedies for breaches of rights protected by Community law (see Chapter 9.1).

Thirdly, the division of powers between the Community and the Member States. The far-reaching consequences of the principles of supremacy and loyal co-operation should not obscure the fact that Community competencies are fundamentally limited in scope:

“[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. [...] Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”¹⁶⁶

If an area falls outside the scope of the Treaty, the Community cannot act, as was the case with asylum before the entry into force of the Treaty of Amsterdam. But also if an area falls within the scope of Community competence, Community action may not be justified. According to the “subsidiarity principle”, in areas which do *not* fall within the Community’s “exclusive” competence (such as asylum law, as we will see),

“the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”¹⁶⁷

Application of the principle is further determined by the Protocol on subsidiarity. The practical legal consequences of this principle are, however, modest as the Community organs enjoy considerable discretion in this context. The principle is complied with if the preamble to a piece of Community legislation

establishes the reasons why Community action was needed.¹⁶⁸ Closely connected is the principle of proportionality: Community action must be undertaken in a way that is proportionate to the aim pursued. This principle for example forbids the Community to adopt a regulation if the purpose could also be achieved with a directive.

Sources

[57] The rules of Community law on asylum stem from several sources. Among these sources of Community law a strict hierarchical order prevails: inferior legal norms must comply with superior ones. At the top of this hierarchy stands “primary Community law”, consisting of the Treaty on European Community, those provisions of the Treaty on European Union that have bearing on Community law, and the Protocols attached to both Treaties.¹⁶⁹ Legislation adopted pursuant to this primary law, such as directives, regulations and decisions, is called “secondary law”.

Agreements to which the Community is party, as well as unwritten law (the “general principles of Community law”) enjoy ranking superior to secondary law.¹⁷⁰ The position within the Community legal hierarchy of general principles, international customary law and international treaty law to which the Community is not party raise some intricate questions of great importance for asylum law. Therefore, these sources of law will be discussed at length separately, in paragraph 2.2.2.

[58] Secondary law is laid down in “regulations”, “directives”, “decisions”, “recommendations” and “opinions”.¹⁷¹ Most European asylum law has been laid down in regulations and directives. Both kinds of instrument are general normative measures: they are binding, and not addressed at specific individuals. The feature distinguishing regulations from directives is their “direct applicability”.¹⁷² That is, regulations need and may not be transposed by the Member States into domestic legislation.¹⁷³ Regulations therefore have legal effect independently of any national law, and apply within the Member States in very much the same way as domestic legislation.

Directives on the other hand are “binding as to the result to be achieved” but leave “to the national authorities the choice of form and methods”.¹⁷⁴ In contrast to regulations, they require implementation, transposition into domestic law. In principle, it is not the directives but the domestic legislation implementing them that works within the domestic legal order and affects the legal position of individuals. In principle, for this rule suffers many exceptions (see further paragraph 9.2).

As to the other instruments mentioned above, recommendations and opinions have no binding force, and play a minor role in European asylum law as means of interpretation of directives and regulations (see paragraph 1.5.5 below). Regulations and directives may further delegate legislative powers. Delegated standards may be laid down in regulations as well as in measures *sui generis*.¹⁷⁵

1.5.3 Instruments of European asylum law

[59] Having discussed the sources of Community law, we should define which instruments make part of “European asylum law” as addressed in the following Chapters. Only law that explicitly addresses “asylum” as defined in paragraph 1.3 is addressed. As to primary Community law, Article 63 (jo 61) TEC provides a legal basis for adopting “measures” (which leaves the choice between regulations and directives) on asylum. These provisions are discussed in Chapter 3, together with other TEC and TEU provisions and Protocols attached to them that have bearings on these provisions or on the legislation based on them.

Legislation based on other Treaty provisions than Article 63 TEC may be relevant for asylum practice in Europe as well, such as legislation based on Article 62 TEC, concerning visa requirements and other rules on the entry of the European Union. But for two reasons I address only legislation based on Article 63 TEC. First, most of that other legislation is not intended to address the need for protection of persons within the scope of international asylum law. Second, it does not show sufficient coherence with the main body of European asylum legislation – the directives and regulations based on Article 63 TEC.

[60] On the basis of Article 63 TEC, hitherto nine measures have been adopted that explicitly and specifically deal with asylum. For the present study, the most important ones are the following four measures:

- *Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, henceforth: the Qualification Directive (or QD; cf. Article 63(1)(c))*,¹⁷⁶
- *Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a*

third-country national, henceforth: the Dublin II Regulation (or DR; cf. Article 63(1)(a));¹⁷⁷

- *Council Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, henceforth: the Reception Standards Directive (or RSD; cf. Article 63(1)(b));¹⁷⁸
- *Council Directive 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, henceforth the Temporary Protection Directive (or TPD; cf. Article 63(2)(a)).¹⁷⁹

Not yet adopted is the

Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, henceforth: the Procedures Directive or PD (see number [61]; cf. Article 63(1)(d)).¹⁸⁰

Of considerable importance for persons eligible for protection in the Common European Asylum System is further

- *Council Directive 2003/86 of 22 September 2003 on the right to family reunification*, henceforth Family Reunification Directive (or FRD; cf. Article 63(3)(a)).¹⁸¹

These measures will be discussed extensively in Chapters 4 to 8.

[61] The other measures adopted on the basis of Article 63 do not have important or direct implications for the enjoyment of international asylum rights, but some of them are sideways addressed in the present study. It concerns:

- *Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, henceforth also: the Dublin Application Regulation (or DAR, cf. Article 63(1)(a));¹⁸²
- *Council Regulation 2725/2000 of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention*, henceforth also: Eurodac Regulation;¹⁸³
- *Council regulation 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention*;¹⁸⁴

- *Council Decision 2000/596 of 28 September 2000 establishing a European Refugee Fund*,¹⁸⁵ and *Council Decision of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010*.¹⁸⁶

[62] All mentioned directives state a period for transposition into domestic law. Before the expiration of this period they cannot, in principle, be relied upon by individuals in the Member States.¹⁸⁷ The transposition terms of the Directives on Temporary Protection, Reception Standards and Family Reunification expired on 31 December 2002, 6 February 2005 and 3 October 2005 respectively; the transposition terms of the Qualification Directive will expire on 10 October 2006.¹⁸⁸ The Dublin Regulation applies to applications lodged since 1 September 2003, the Dublin Application Regulation applies since 6 September 2003.¹⁸⁹ In the discussion below, I will discuss all instruments as if the transposition terms had all expired. As to the Proposal for the Procedures Directive, the Council had “reached a general approach”, which arguably amounts to consent, on most of its provisions by 29 April 2004, and made a few changes before sending it to the European Parliament for advice (cf. number [65]). Below, I will discuss the text of the Amended Proposal as if it were adopted and implemented, referring to the Proposal as it read in the version of 9 November 2004 as ‘the Procedures Directive’.¹⁹⁰

In the near future, European asylum law will encompass a few more measures. The Directives on Qualification and Procedures delegate power to the Council to adopt certain “acts” or “decisions” concerning asylum (addressed under numbers [316], [446] and [533]).

[63] Most relevant for the European law on asylum are further “general principles of Community law”, discussed in Chapter 2. The discussion further includes a number of instruments that are not sources of Community law. In Chapter 7 I address the Dublin Convention and related agreements with Norway, Iceland and Switzerland on allocation of asylum requests, as these instruments function in the immediate context of Community rules on such allocation. Finally, I address the Charter on Fundamental Rights. As will be argued in paragraph 2.3.7, Community law does provide for a justification for doing so.

The term “European asylum law” (or “Community law on asylum”), then, refers to all sources mentioned above: Article 63 TEC and other relevant provisions of primary law as identified in chapter 3; the legislation based on it, and standards adopted pursuant to delegation by those instruments (see the previous paragraphs); relevant “general principles of Community law” as

identified in Chapter 2.2; relevant Charter provisions identified in Chapter 2.3, and the Dublin Convention and related instruments mentioned in Chapter 7. The ten measures listed above are referred to below as “European asylum legislation” (or as “Community legislation on asylum”). According to their Preambles, the first five measures serve to establish the “Common European Asylum System”. The term “Common European Asylum System” or CEAS as applied below refers to the system established by these five measures.

1.5.4 Institutions and decision-making procedures

Procedures

[64] The Treaty on European Community establishes for each policy area how and by which Community institutions secondary legislation is to be adopted. For the measures mentioned in Title IV, the relevant rules are to be found in Articles 67, 64(2) and, in conjunction with the former, Article 202 TEC. These Articles provide for no less than five procedures for adoption of measures on asylum.¹⁹¹

[65] All regulations and directives on asylum (except for the Dublin Application Regulation, see below) presently in force were adopted according to (1) the procedure laid down in Article 67(1):¹⁹²

“During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.”

These measures were thus adopted by the Council, voting unanimously. It decided upon a “proposal” by the Commission or upon an “initiative” by a Member State,¹⁹³ and after “consultation” of the European Parliament. The role of the latter is hence confined to mere advice.

[66] Since 1 May 2004, asylum and immigration are subject to different regimes of decision making. For asylum (the measures pursuant to Article 63(1) and (2)(a) TEC), the procedure (2) is laid down in Article 67(5). It states that “provided that the Council has previously adopted, in accordance with [Article 67(1)], Community legislation defining the common rules and basic principles governing these issues”, measures based on Article 63(1) and (2)(a) will be adopted according to the “co-decision” procedure laid down in Article 251 TEC.¹⁹⁴ By virtue of a Council decision pursuant to Article 67(2) TEC, the co-decision procedure also applies to measures based on Article 63(2)(b) TEC.¹⁹⁵

The co-decision procedure differs in important respects from the Article 67(1) procedure. Only the Commission can submit proposals, the Council decides by “qualified majority”, not by unanimity, and the European Parliament has not merely an advisory role, but can reject proposed legislation.¹⁹⁶

Since 1 May 2004, the Article 67(1) TEC still applies to measures meant in Article 63(3) TEC, except for one minor change (3): the Member States do not any longer enjoy the right of initiative.¹⁹⁷

[67] Article 64(2) states that in case of “an emergency situation characterised by a sudden inflow of nationals of third countries”, the Council can take measures by qualified majority on a proposal by the Commission (4). In contrast to the Article 67(1) procedure, unanimity is not required; different from the co-decision procedure, the European Parliament has no say.

Finally, (5) pursuant to Article 202 TEC the Council can delegate regulatory powers to the Commission as to “certain requirements in respect of the exercise of these powers”.¹⁹⁸ The Council indeed delegated power in the Dublin Regulation. On that basis, the Commission adopted the Dublin Application Regulation. The adoption of certain standards delegated in the Procedures Directive is subject to specific decision making procedures.

Institutions

[68] With an eye to the assessment of the value of certain types of documents for the interpretation in the next paragraph, we should briefly address here the Community institutions that were involved in the making of present legislation on asylum (in the Article 67(1) TEC procedure, see above). All present asylum measures are based upon a “proposal” by the Commission.¹⁹⁹ The Commission has, as its primary role, promoting the Community’s objectives. Though the Commissioners are appointees of the Member States,²⁰⁰ they are expected to promote the objectives and interests of the Community, not to represent the interests of “their” Member States.

The Community organ deciding on each proposal, the Council, on the other hand consists of a representative of each Member State, at ministerial level,²⁰¹ who can (and are expected to) pursue national interests. The actual constitution of the Council depends on the subject matter to be discussed. European asylum law is a matter of the “Justice and Home Affairs” (JHA) Council, consisting of the ministers of the Member States on the concerned subject. Actual Council negotiations are in fact often done by civil servants in various committees such as the Committee of permanent representatives (Coreper) and, specifically for asylum and immigration issues, the Strategic

Committee for Immigration, Frontiers and Asylum (SCIFA) and the High Level Working Group on Asylum and Immigration.²⁰²

Council negotiations are in fact steered to a large extent by the Council Presidency. Each Member State holds the Presidency for six months.²⁰³ It sets the agenda for Council meetings, identifies issues for discussion, and proposes solutions, in fact amendments to the proposal, if it does not meet with unanimous approval.

Distinct from the Council of the European Community is the European Council: an organ of the European Union, consisting of the heads of state or government of the Member States, and the president of the Commission.²⁰⁴ The European Council cannot adopt legislative measures on asylum, but it sets out the “general political guidelines” of the European Union.²⁰⁵ It addressed asylum policy in its Tampere Conclusions that partially shaped the present body of European asylum law (see number [49]), and again in the “the Hague Program”, on future immigration law and policy (see paragraph 10.3).

[69] Pursuant to Article 67(1) TEC, the Council had to “consult” the European Parliament on each piece of asylum legislation. Most discussions of legislation proposals took place in the “Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs” or LIBE Committee. The Assembly of the European Parliament “adopted” the proposals as “amended” as suggested by the Committee’s “rapporteur”.

Finally, the Council “consulted” other organs of the European Community, the Economic and Social Committee and the Committee on the Regions, on all proposals.²⁰⁶

1.5.5 Interpretation

The Court of Justice

[70] The Court of Justice has the final say on all matters concerning validity and interpretation of all Community law.²⁰⁷ It is assisted by the Court of First Instance (CFI; both henceforth also referred to as the Luxembourg Courts). Direct approach to these courts by litigants is possible only in specific types of cases, and for specific parties (see further paragraph 9.1.2). Next to trying direct appeals, the Court of Justice has the task of answering “preliminary questions”. These are questions submitted by domestic courts on the interpretation or validity of Community law.²⁰⁸ Under what conditions preliminary questions on European asylum law can or must be stated is discussed in Chapter 9.1.4.

Finally, Article 68(3) TEC provides for a procedure specific for Title IV:

“The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title.”

As yet, this competence has not been made use of.

A Court official occasionally referred to below is the Advocate-General, who delivers an “opinion” on each case brought before the Courts.²⁰⁹ These opinions do not bind the Courts, but the usually lucid style of these opinions can shed light on less transparent parts of the Courts’ reasoning.

Means

[71] Do Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties apply to Community law? The Luxembourg Courts explicitly refer to the Vienna interpretation rules only when interpreting agreements under international law.²¹⁰ But where the internal legal order of the Community is concerned, the matter is different. We saw above the Court of Justice conceives of the Community as a new legal order, different and independent from ordinary international law. The Treaty on European Community that “created” this legal order is therefore conceived of as an instrument with constitutional traits rather than an agreement governed by the rules of international law. Consequently, the Vienna Convention on the Law of Treaties does not apply. Indeed the Court does not refer to the rules laid down in the Vienna Convention where interpretation of provisions of the Treaty and secondary legislation is concerned. Moreover, the Court’s approach to interpretation deviates from the rules in Articles 31-33 VTC. I will therefore briefly discuss the Court’s approach to interpretation of both secondary and primary Community law, in order to sort out which means of interpretation may be applied to Community law.

[72] The Court bases its interpretation of Community law on wording, context and purpose.²¹¹ These means are the ones mentioned in Article 31(1) and (2) first clause VTC as the “primary means of interpretation”. But the Court’s use of these means, especially its well-known propensity for teleological interpretation, leads to results unlikely to be achieved when strictly adhering to the Vienna Convention rules. Most revealing is the Court’s conclusion in *Van Gend en Loos*, the judgement in which the Court launched the concept of direct effect:

“[...] according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.”²¹²

Hence, interpretation to wording and context are very much *supplementary* to the purpose.²¹³ Moreover, it is not the purpose of the provision, but rather the purpose of the Treaty as a whole that guides the interpretation. In *Van Gend en Loos*, this approach revealed “obligations” and “rights” not explicitly mentioned in the Treaty text. In *Van Duyn* the Court concluded that directive provisions could have direct effect – which finding puts considerable strains with both text and context of the relevant provision.²¹⁴

[73] As to the other means of interpretation laid down in the Vienna Convention, Article 31(2) states that agreements and instruments made by the contracting parties relating to a treaty make part of its context. It appears that such instruments are not to be taken into account when interpreting Community law. In *Antonissen* the Court ruled on a “declaration” recorded in the Council minutes on a directive provision that

“such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance.”²¹⁵

A declaration as such on the interpretation of Community legislation is therefore devoid of any value for interpretation. But it should be noted that the Court speaks of reference to the *content* of the declaration, not of reference to the declaration itself. This leaves open the possibility that a document expressing the intent of the legislator (the Contracting parties if the Treaty is concerned, the Council as to Community legislation) has some meaning for interpretation of a provision, if that intent finds expression in the relevant provision. Arguably, the declaration should then be treated as akin to a preparatory work as meant in Article 32 VTC (to be discussed below).

A reason for this refusal to take agreements as meant in Article 31(2) VTC into account has been provided for in connection with the *Wijsenbeek* case. The litigant parties, explicitly referring to Article 31(2) VTC, invoked a declaration adopted by all Member States contained in the Final Act of the Single European Act on Article 7A TEC (now 14 TEC, the freedom of movement).²¹⁶ The Court solved the case without addressing the declaration, but Advocate-General Cosmas commented:

“once provisions of primary Community law have been inserted into the text of the Treaty and made applicable in the Community legal order, they acquire autonomous value in relation to the will of their authors, just as the provisions of a constitutional act acquire autonomous value in relation to the will of the constituent legislature which enacted them. The will of the

author of a provision of Community law is but one of the parameters in the interpretation of that provision, and far from the most important one; the value of this interpretative criterion is significantly less than that which the will expressed by the States has in public international law when they draw up a normative international text”.²¹⁷

Although the Advocate-General does not exclude that declarations might have some value for the interpretation of Treaty provisions, that value cannot be the one attributed by Article 31(2) VTC because of the constitutional character of the Treaty.

[74] On the basis of apparently the same kind of reasoning the Court has categorically ruled out that state practice subsequent to the conclusion of the Treaty on European Community, or to the adoption of secondary law, could be relevant for interpretation (cf. Article 31(3)(b) VTC).²¹⁸ The same holds true for later agreement on the interpretation of the Treaty (Article 31(3)(a) VTC), because in *Defrenne II*, the Court stated that a declaration by all Member States delaying a time limit laid down in a Treaty provision “was ineffective to make any valid modification” of that time limit.²¹⁹ The Court clarified:

“In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 [old, cf. Article 48 TEU].”

As to applicable rules of international law as a means of interpretation, the Court does refer to both custom as well as agreements to which the Community is party when interpreting both primary and secondary Community law, in conformity with Article 31(3)(c) VTC (quoted under number [22]).²²⁰ As an international organisation, the Community is, as well as states, a subject of international law. Interpretation of internal law (Community law) in conformity with international law merely bears evidence to the monistic reception of international law within the Community legal order.

[75] As to the preparatory works as a means of interpretation (cf. Article 32 VTC), the Court could not take them into account as far as the Treaties are concerned as these were never published.²²¹ But for interpretation of secondary Community law, the legislative history does play a rôle.

Above, the institutions involved in the adoption of asylum legislation were identified. Each of them issued documents that could be relevant for the interpretation of that legislation. The Commission proposals contain, next to the proposed Directive or Regulation provisions, an “Explanatory Memorandum”

on the scope and objectives of the measure and a “Comment on Articles”. The Council produces working documents that contain the outcome of meetings on proposals, usually in the form of amended provisions or proposals for amendments and occasionally reasons for amendments. The European Parliament, the Economic and Social Committee and the Committee on the Regions issued opinions on all pieces of legislation. Of these documents, only the draft articles and the mentioned opinions are published in the Official Journal; the other documents are all accessible on the web-sites of the various institutions.

[76] In case law of the Luxembourg Courts, the explanatory memoranda to Proposals are occasionally referred to.²²² Views laid down in a proposal are not to be taken into account if not expressed in the final text,²²³ and, if taken into consideration, only as supplementary means.²²⁴ Opinions by the European Parliament and the Economic and Social Committee are also applied for interpretation.²²⁵

As to amendments (and their explanatory notes) by Member States during Council negotiation, the situation is unclear. I have not found references to them in case law. One could argue they should not serve as supplementary means of interpretation because in contrast to Commission proposals and opinions of the Parliament and the Economic and Social Committee, such Council documents are not explicitly referred to in the concerned directive or regulation.²²⁶ Further, the Court has shown a tendency of keeping a distance from the Council’s decision making.²²⁷ On the other hand, the Court takes Explanatory memorandums to Commission proposals into account although they are not published in the Official Journal. The easy access to Council documents by means of its register is a new phenomenon (since 2002), which may explain why the Court has never alluded to them. And from the *Antonissen* judgement we can, arguably, deduce that if a regulation or directive provision refers to the content of a Council document, it can be applied for interpretation.²²⁸ Finally, amendments proposed by Council members and their explanatory notes express as well as Commission proposals the intent of the legislator. For these reasons, I think publicly available Council documents containing amendments expressed in the adopted text can be applied as supplementary means of interpretation.

[77] Finally, as to the value to be attached to different language versions, the Court’s approach is consistent with Article 33(3) and (4) VTC:

“the various language versions of a provision of Community law must be uniformly interpreted, and thus, in the case of divergence between those

versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part".²²⁹ According to the Court of Justice, domestic courts must, when interpreting Community law, take into account "the different language versions".²³⁰ At present, no less than 21 language versions of both the treaties as well of Community legislation are equally authentic.²³¹

Conclusion

[78] The Court is the supreme authority on all matters concerning interpretation of both primary and secondary law.²³² Hence, when interpreting European asylum law the Court's approach must be followed. This entails interpretation as to the literal meaning, read in the context and, emphatically, to the purpose. The context encompasses the preamble as well as documents or instruments explicitly referred to. For European asylum legislation, this means that the Commission proposals including explanatory memorandum and the comments by the European Parliament and the opinions issued by the Economic and Social Committee and the Committee of the Regions. The Comment on Articles and, arguably, publicly accessible Council documents can be invoked on the same footing as Commission proposals. Comments on drafts have value for interpretation only if their content is reflected in the actually adopted text, and then only as supplementary means. Finally, as many language versions as possible should be taken into account.

The method of interpretation applied by the Community judiciary deviates in some important respects from the rules laid down in Article 31 VTC. Agreements reached or instruments adopted in connection with the conclusion of the Treaty or the adoption of Community legislation, subsequent agreements on interpretation and subsequent state practice (Article 31(2)(a) and (b) and (3)(a) and (b) VTC) are denied any rôle.

NOTES

- ¹ ICJ 20 November 1950, *ICJ Reports* 1950, p. 274 (*Asylum case*).
- ² See paragraph 1.5.1.
- ³ Preamble recitals (1) QD, PD, RSD, TPD, DR.
- ⁴ See paragraph 4.4.
- ⁵ See, among others, Boccardi 2002, Lavenex 2001, Berger 2000.
- ⁶ Spijkerboer 2002, p. 19; Julien-Laferrière 2005.
- ⁷ See for views on the working of European law within the domestic legal order that differ substantially from the view of the Court of Justice, Craig & De Búrca 2003, pp. 285f.; see for a view on the working of Strasbourg decisions within the German legal order that arguably differs substantially from views of the European Court of Human Rights on the matter BVerfG 28 December 2004, 1 BvR 2790/04.
- ⁸ On the history and development of the term, see Grahl-Madsen 1972, p. 3f.
- ⁹ Cf numbers [11] and [148].
- ¹⁰ See par. 3.3.2.
- ¹¹ Cf. numbers [183] and [232].
- ¹² Grahl-Madsen 1972, p. 482; Noll 2000, p. 15; Bouteillet-Paquet 2001, p. 33.
- ¹³ Institut du Droit International, *L'Asile en Droit International Public*, 11 September 1950, quoted in Grahl-Madsen 1972, p. 3.
- ¹⁴ Cf. Article 14 UDHR, quoted under number [11].
- ¹⁵ Art. 38(1) Statute of International Court of Justice, 26 June 1945, 1 UNTS XVI.
- ¹⁶ In ICJ 20 December 1974, *ICJ Reports* 1974, p. 267 (*1974 Nuclear Tests Cases: Australia v. France*) and ICJ 20 December 1974, *ICJ Reports* 1974, p. 472 (*1974 Nuclear Tests Cases: New Zealand v. France*).
- ¹⁷ Cf. the words “expressly recognized”, “accepted” and “recognized” in Article 38(1)(a), (b) and (c) of the Statute. See on the acceptance of custom number [19].
- ¹⁸ Seidermann 2001, pp. 16-23, with further references.
- ¹⁹ Seidermann 2001, pp. 20-23; Van Hoof 1983, pp. 76-81.
- ²⁰ Cf. Brownlie 1998, p. 3f.
- ²¹ General Assembly resolution 217 A (III) of 10 December 1948
- ²² See for example Feller 1989, p. 60; Meijers & Nollkaemper 1997.
- ²³ See Noll 2000, pp. 358-362 and Marx 1995, p. 387. On the requirements for formation of customary law see number [19].
- ²⁴ Bouteillet-Paquet 2001, pp. 90-91.
- ²⁵ Grahl-Madsen 1972, pp. 100-101 and 104-105.
- ²⁶ 189 UNTS 150, entry into force 22 April 1954.
- ²⁷ Article 1A(2), second clause: “*In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of*

which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national”.

²⁸ I.e. if the alien is recognised by the authorities of the country where he resides “*as having the rights and obligations which are attached to the possession of the nationality of that country*”.

²⁹ Protocol relating to the Status of Refugees, New York, 31 January 1967, UNTS 606, 267.

³⁰ See www.unhcr.ch, “*Declarations and Reservations to the 1951 Convention relating to the Status of Refugees as of 1 October 2004*”, visited 24 January 2005.

³¹ See the previous footnote.

³² With a few exceptions such as Article 30 RC, see number [566].

³³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

³⁴ Other conventions contain express prohibitions of *refoulement* as well, as Article 45 of the Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (the Fourth Geneva Convention): “*In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.*” Article 10 of the Agreement relating to Refugee Shipmen of 23 November 1957, 506 UNTS 125: “*No refugee shipman shall be forced, as far as it is in the power of the Contracting Parties, to stay on board of a ship which is bound for a port or is due to sail through waters, where he has well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion*”. Both provisions have little meaning for European asylum law, due to their limited scope, practically completely overlapped by the other prohibitions, and the fact that they did never give rise to any significant case law. For these reasons, both provisions will not be discussed below. For a discussion of Article 45 of the Fourth Geneva Convention in relation to asylum law, see Noll 2000, pp. 366 and 384-386.

³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5.

³⁶ ECtHR 15 November 1996, *Rep.* 1996-V (*Chahal v. UK*), par. 80.

³⁷ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

³⁸ CCPR general comment 20, 10 April 1992 under 9: “*In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.*”

³⁹ See for example HRC 30 July 1993, No. 470/1991 (*Kindler v. Canada*); HRC 5 November 1993, No. 469/1991 (*Ng v. Canada*).

⁴⁰ EComHR 13 September 1996, Appl. No. 25894/94 (*Bahaddar v. The Netherlands*), par. 78,

confirmed by the Court in ECtHR 12 December 2001, *Rep.* 2001-XII (*Bankoviç et al. vs Belgium and 16 Other States*), par. 68.

⁴¹ ECtHR 12 December 2001, *Rep.* 2001-XII (*Bankoviç et al. vs Belgium and 16 Other States*), par. 68; as to Article 6 the Court stated so already in ECtHR 7 July 1989, Ser. A vol. 161 (*Soering v. United Kingdom*), par. 113.

⁴² Steenbergen et al. 1999, p. 168; Noll 2000, pp. 453-473; Lawson 1999, pp. 244-246.

⁴³ Steenbergen et al. 1999, pp. 167-168.

⁴⁴ I will revert to the issue when discussing the requirements international law sets on expulsion of aliens to third countries (par. 7.4.2).

⁴⁵ See paragraphs 6.2.1, 6.3.1 and 6.5.1.

⁴⁶ See further paragraph 8.7.2.

⁴⁷ Lauterpacht & Bethlehem 2003, p. 68. According to Goodwin-Gill, the required generality of acceptance of the principle as law also follows from other sources such as UNGA declarations (Goodwin-Gill 1998, pp. 167-8). Coleman 2003, p. 48f argues that the requirement is not fulfilled as a too great number of specially affected states did not accept the principle; however he accepts the existence of a regional, European customary rule of non-*refoulement*. Whether the rule is “general” or (merely) regional does not matter for the purposes of this study, as regional customary law would provide a yardstick for European asylum law in the same way as a rule of general customary law would do.

⁴⁸ For the practice of the Member States in this respect, see Bouteillet-Pacquet (ed.) 2002.

⁴⁹ Donner 1993, pp. 5-59.

⁵⁰ Cf. House of Lords, 19 December 2000, [1999] CA [2000] HL (*R. v. Secretary of State for the Home Dept., ex parte Adan and Aitseguer*).

⁵¹ Vienna Convention on the Law of Treaties, 24 May 1969, 1155 UNTS 331.

⁵² France, Ireland, Portugal and Luxembourg and Malta have not ratified the Vienna Treaty Convention (<http://www.jurisint.org/pub/01/en/421.htm>, visited 24 January 2005).

⁵³ Art. 4 VTC: “*Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.*”

⁵⁴ ICJ 12 November 1991, *ICJ Reports* 1991, p. 53 (*Arbitral Award of July 31, 1989*), par. 48, quoted under number [24]; ECtHR 21 February 1975, Ser. A vol. 18 (*Golder v. UK*), par. 29.

⁵⁵ Two of the monitoring bodies established by these treaties, the Human Rights Committee and the European Court of Human Rights, have explicitly acknowledged the applicability of the VTC interpretation rules to the CCPR and the ECHR. For example HRC General Comment 26 under (1), 61st sessions 1997; ECtHR 21 February 1975, Ser. A vol. 18 (*Golder v. UK*), par. 28 and ECtHR 12 December 2001, *Rep.* 2001-XII (*Bankovic et al. vs Belgium and 16 Other States*), pars. 55f.

- ⁵⁶ Aust 2000, p. 187.
- ⁵⁷ Cf. Noll 2000, pp. 381-382, with references to other authors: “[...] *the interpreter shall establish the ordinary meaning to be given to the terms of a treaty. Where this operation leads to a clear result, interpretation has come to an end, and no further action is necessary. If and only if such clarity is not attained, the interpreter shall proceed to the second stage, drawing on the context as well as the object and purpose of the treaty to dissolve the ambiguity resting in ‘the ordinary meaning’.*”
- ⁵⁸ Elias 1974, pp. 74-75; cf. Reuter 1989, p. 75 and Aust 2000, p. 188.
- ⁵⁹ ICJ 12 November 1991, *ICJ Reports* 1991 (*Arbitral Award of July 31, 1989*), p. 53 and pp. 69-72.
- ⁶⁰ ICJ 3 February 1994, *ICJ Reports* 1994, p. 6 (*Libyan Arab Jamahiriya v. Chad*), par. 41.
- ⁶¹ Palmer 1976, pp. 44f.
- ⁶² See paragraph 2.1.4 for an example.
- ⁶³ Cf. Aust 2000, p. 197.
- ⁶⁴ Sinclair 1984, pp. 142-144.
- ⁶⁵ Aust 2000, p. 198.
- ⁶⁶ ICJ 21 June 1971, *ICJ Reports* 1971, p. 16 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*), par. 53.
- ⁶⁷ Cf. the final clause to both Refugee Convention and the European Convention on Human Rights, Article 53(1) CCPR and Article 33(1) CAT.
- ⁶⁸ Article 33(1) and (3) VTC.
- ⁶⁹ Article 33(4) VTC.
- ⁷⁰ ICJ 21 June 1971, *ICJ Reports* 1971, p. 16 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*), par. 53, see number [26].
- ⁷¹ ICJ 3 February 1994, *ICJ Reports* 1994, p. 6 (*Libyan Arab Jamahiriya v. Chad*), par. 41, see number [24].
- ⁷² Article 38 RC: “*Settlement of disputes - Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute*”.
- ⁷³ Article 34(1) Statute of the ICJ.
- ⁷⁴ Installed by UNGA Resolution 428(V), 14 December 1950.
- ⁷⁵ Spijkerboer & Vermeulen 1995, p. 495.
- ⁷⁶ Established by resolution 672 (XXV), 30 April 1958, of the Economic and Social Council of the United Nations.
- ⁷⁷ HCR/IP/4/Eng/REV.1, Reedited, Geneva, January 1992, UNHCR 1979
- ⁷⁸ ExCom Conclusion no. 8 (XXVIII).

- ⁷⁹ Foreword to the Handbook, under (V). It concerns the explanations to the refugee definition and the procedures for that determination (ibid., under (V) and (VI).
- ⁸⁰ Spijkerboer & Vermeulen 2005, p. 26.
- ⁸¹ Articles 28f CCPR.
- ⁸² Article 1 of the first Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 302.
- ⁸³ “The Committee shall forward its views to the State Party concerned and to the individual.” - Article 5(4) OP CCPR.
- ⁸⁴ Brownlie 1990, p. 649.
- ⁸⁵ HRC 27 October 1994, No. 386/1989, CCPR/C/52/D/386/1989 (*Koné v. Senegal*), par. 11.
- ⁸⁶ Article 5(4) OP ICCPR. The same holds true for the terms “*constatations*” and “*соображения*” in the – equally authentic – French and Russian language versions of the provision.
- ⁸⁷ MacGoldrick 1994, pp. 202-204.
- ⁸⁸ MacGoldrick 1994, pp. 198-204; Ingelse 1999, p. 169.
- ⁸⁹ Article 28(3) CCPR.
- ⁹⁰ MacGoldrick 1994, p. 44.
- ⁹¹ Article 5(3) OP CCPR.
- ⁹² MacGoldrick 1994, pp. 152-153.
- ⁹³ HRC, *Concluding observation* of 4 August 1997, CCPR/C/79/Add.80, par. 21.
- ⁹⁴ MacGoldrick 1994, pp. 152-153.
- ⁹⁵ Article 22(1) and 22(7) CAT.
- ⁹⁶ CaT 9 May 1997, CAT/C/18/D/34/1995 (*Aemei v. Switzerland*), par. 11; cf. Steenbergen 1999, pp. 198-199.
- ⁹⁷ The terms “*constatations*” and “*мнения*” (“*opinions*”), applied in the equally authentic French and Russian text versions, also imply that the views do not bind.
- ⁹⁸ Article 30(1) CAT: “*Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.*”
- ⁹⁹ Rules of Procedure, adopted by the Committee at its first and second sessions and amended at its thirteenth, fifteenth and twenty-eighth sessions, CAT/C/3/Rev.4 of 9 August 2002.
- ¹⁰⁰ Rule 101.
- ¹⁰¹ Rule 103.
- ¹⁰² Rule 36.
- ¹⁰³ Steenbergen et al. 1999, pp. 198-200.

- ¹⁰⁴ Cf. Hailbronner 2000, p. 44, who questions on that ground “*whether Strasbourg jurisprudence has a binding effect for states not involved in a particular case*”.
- ¹⁰⁵ ECtHR 18 January 1978, Ser. A vol. 25 (*Ireland v. UK*), par. 154.
- ¹⁰⁶ *T.I. v UK*, The Law, Article 3, The Court’s assessment under 1.
- ¹⁰⁷ ECtHR 18 July 1994, Ser. A vol. 294-A (*Wynne v. UK*), par. 36.
- ¹⁰⁸ Lawson 1999, pp. 107-108.
- ¹⁰⁹ Lawson, *ibid*.
- ¹¹⁰ To be sure, it does not follow that the rules for treaty interpretation do not apply, or that the Court’s case-law is beyond criticism. The above consideration merely concerns the legal effect of the Court’s case law, not its accuracy.
- ¹¹¹ Articles 33 and 34 ECHR.
- ¹¹² Articles 35(3) and 38(1) ECHR.
- ¹¹³ Article 43 ECHR.
- ¹¹⁴ Cf. Van Dijk & Van Hoof 1998, pp. 97f.
- ¹¹⁵ Cf. Coleman 2003, p. 41-43 who refers to the Dublin Convention and proposals for European asylum legislation in order to assess the territorial scope of the prohibitions of *refoulement*.
- ¹¹⁶ Hailbronner 2000, pp. 380-381.
- ¹¹⁷ See for thorough description and analysis of the development of European asylum law Boccardi 2002, Lavenex 2001, Bouteillet-Pacquet 2001, Noll 2000 and Berger 2000.
- ¹¹⁸ Cf. Article 7A TEC (old, introduced by the Single European Act of 1986, *OJ* [1987] L 169/1, after amendment by the Treaty of Amsterdam Article 14 TEC (new)): “*The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 [...]. The internal market shall comprise an area without internal frontiers in which the free movement of goods persons, services and capital is ensured in accordance with the provisions of this Treaty.*”
- ¹¹⁹ *White Paper on the Completion of the Internal Market* (COM(1985)310def), par. 11.
- ¹²⁰ Cf. Guild 2000, p. 202; Spijkerboer & Vermeulen 1995, p. 254. Measures pursuant to Article 7A TEC were to be adopted by unanimity voting in the Council.
- ¹²¹ *Agreement between the Governments of the States of the Benelux Economic Union, the Federal republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders* of 14 June 1985, *OJ* [2000] L239/13-18.
- ¹²² Articles 17 and 20 Schengen Agreement.
- ¹²³ *Convention applying the Schengen Agreement of 14 June 1985 [...]* of 19 June 1990, *OJ* [2000] L239/19.
- ¹²⁴ See Spijkerboer & Vermeulen 2005, pp. 165f.
- ¹²⁵ *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*, *OJ* [1997] C/254.
- ¹²⁶ *Agreement between the European Community and the Republic of Iceland and the Kingdom*

of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, *OJ* [2001] L93, p. 40.

¹²⁷ With its entry into force in 1997 the Dublin Convention replaced the relevant provisions of the Schengen Implementation Agreement pursuant to the Bonn Protocol, see Noll 2000, p. 128.

¹²⁸ Article 3(3) DC.

¹²⁹ It adopted four such decisions: *Decision 1/97 of 9 September 1997 concerning provisions for the implementation of the Convention* (*OJ* [1997] L281/1-25), *Decision 2/97 of 9 September 1997 establishing the Committee's Rules of Procedure* (*OJ* [1997] L281/26), *Decision 1/98 of 30 June 1998 concerning provisions for the implementation of the Convention* (*OJ* [1998] L196/49-50), and *Decision 1/2000 of 31 October 2000 concerning the transfer of responsibility for family members in accordance with Article 3(4) and Article 9 of that Convention* (*OJ* [2000] L281/1-2).

¹³⁰ See Boccardi 2002, pp. 74-87, Noll 2000, pp. 199-203 and 215-223.

¹³¹ Noll 2000, p. 129, Hailbronner 2000, p. 49.

¹³² So the Commission in its Working Paper 'Evaluation of the Dublin Convention' of 13 June 2001, SEC(2001)756; Boccardi 2002, p. 56; on the adverse results of the Dublin Convention for burden sharing, see Noll 2000, pp. 317-325.

¹³³ *OJ* [1992] C191.

¹³⁴ Article K.1 ToM.

¹³⁵ Hailbronner 2000 pp. 49-50 contains a full list of these measures.

¹³⁶ *OJ* [1996] L63/2.

¹³⁷ Hailbronner 2000, p. 49 states they "lacked binding legal effect". Noll 2000, p. 49-53 states joint actions are not binding and joint positions not beyond the obligation to defend their content at international conferences; Berger 2000 pp. 35-37 suggests the juridical value has to be assessed on analysis of their content. It seems that the content of the adopted actions and positions leads to the same outcome.

¹³⁸ Berger 2000, p. 39.

¹³⁹ Guild 2000, p. 268.

¹⁴⁰ Kuijper 1998, pp. 359-363; see also Boccardi 2002, pp. 134-135.

¹⁴¹ With the sole exception of Article 63(1)(a) TEC, see number [215].

¹⁴² Article 63, final clause TEC, see number [179].

¹⁴³ *Strategy Paper on migration and asylum policy*, EU Council, 9809/98 REV 1; see Boccardi 2002, pp. 155-160 for a critical analysis.

¹⁴⁴ An organ of the European Union, consisting of the heads of government or of state of the Member States, not to be confused with the Council, an organ of the European Community (see paragraph 1.5.3).

¹⁴⁵ *Tampere European Council 15 and 16 October 1999– Presidency Conclusions*, SN 200/99 (available on http://www.europarl.eu.int/summits/tam_en.htm).

- ¹⁴⁶ See for a thorough assessment Boccardi 2002, pp. 173f.
- ¹⁴⁷ Boccardi 2002, pp. 173-175.
- ¹⁴⁸ Tampere Conclusions 14 and 15.
- ¹⁴⁹ Tampere Conclusion 13.
- ¹⁵⁰ E.g. Presidency's conclusions on justice & home affairs of 17 December 2001 of the European council of Laeken 14 and 15 December, SN 300/1/01 REV 1 (available at http://europa.eu.int/comm/justice_home/news/laecken_council/en/conclusions.htm), par. 37f.
- ¹⁵¹ Preamble recital (2) QD, PD, RSD, TPD and DR (see for these abbreviations p. vii).
- ¹⁵² Tampere Conclusion 14.
- ¹⁵³ *Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice* of 3 December 1998, *OJ* [1999] C19/1-15.
- ¹⁵⁴ Cf. Article 67 TEC. Decision making will be discussed in paragraph 1.5.3.
- ¹⁵⁵ *Treaty establishing the European Community*, *OJ* [2002] C325/33.
- ¹⁵⁶ Article 67(5) of the consolidated Treaty on European Community.
- ¹⁵⁷ *OJ* [2000] C364/1.
- ¹⁵⁸ Articles 18 and 19, see par. 2.3.5 and 2.3.6.
- ¹⁵⁹ See further paragraph 2.3.7 on the current legal status of the Charter.
- ¹⁶⁰ *OJ* [2004] C310/1.
- ¹⁶¹ Article 266(2), discussed in Chapter 3.8 below.
- ¹⁶² Cf. "20. Protocol on Denmark", *OJ* [2004] C310/356; "19. Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation", *OJ* [2004] C310/353, discussed in paragraph 3.8.6.
- ¹⁶³ Boccardi 2002, p. 152f, with references.
- ¹⁶⁴ ECJ 5 February 1963, C-26/62, [1963] *ECR*, p. I-12 (*Van Gend en Loos v. Nederlandse Administratie der Belastingen*).
- ¹⁶⁵ ECJ 15 July 1964, C-6/64, [1964] *ECR*, p. 585 (*Costa v. ENEL*) and ECJ 9 March 1978, C-106/77, [1978] *ECR*, p. 629 (*Amministrazione delle finanze dello stato v. Simmenthal SpA*).
- ¹⁶⁶ Article 5 TEC.
- ¹⁶⁷ *Ibid.*
- ¹⁶⁸ ECJ 13 May 1997, C-233/94, [1997] *ECR*, p. I-2405 (*Germany v. Council*).
- ¹⁶⁹ Cf. Article 311 TEC.
- ¹⁷⁰ Cf. Vanhamme 2001, p. 113; as to general principles of Community law, see Chapter 2.2.
- ¹⁷¹ Article 249 TEC.
- ¹⁷² Art. 249 TEC. The distinction between direct applicability and direct effect is addressed under number [645]. Article 249 TEC introduces yet another distinction between regulations and directives: the former apply to all Member States, the latter only to those men-

tioned in the directive. For us the distinction has no importance as no Member State has been excluded from the scope of relevant directives pursuant to this arrangement. Further, special rules apply to the territorial scope of European asylum law, see paragraph 3.5.

¹⁷³ ECJ 7 February 1972, C-39/72, [1973] *ECR*, p. 101 (*Commission v. Italy*), par. 19.

¹⁷⁴ Article 249 TEC.

¹⁷⁵ Such as the Dublin Application Regulation, see number [61], and the Council acts mentioned under number [62].

¹⁷⁶ *OJ* [2004] L304/12-23

¹⁷⁷ *OJ* [2003] L50/1-10.

¹⁷⁸ *OJ* [2003] L31/18–25.

¹⁷⁹ *OJ* [2001] L 212/12 – 23.

¹⁸⁰ Council doc. 14203/04, Asile 2004/64 of 9 November 2004.

¹⁸¹ *OJ* [2003] L251/12-18.

¹⁸² *OJ* [2003] L222/3-23.

¹⁸³ *OJ* [2002] L316/1-10.

¹⁸⁴ *OJ* [2002] L62/1–5.

¹⁸⁵ *OJ* [2000] L252/12-18.

¹⁸⁶ *OJ* [2004] L382/52.

¹⁸⁷ See however paragraph 9.2.3.

¹⁸⁸ Cf. Articles 31(1) TPD, 26 RSD, 20 FRD and 38(1) QD.

¹⁸⁹ Articles 29 DR and 23 DAR.

¹⁹⁰ Cf. the document referred to in footnote 179. – Article 43 PD states a transposal term of two years, and for one provision (Article 13 PD) even three years.

¹⁹¹ I abstract for the moment from particularities due to the Protocols on the position of Denmark, the United Kingdom and Ireland. In general, Denmark does not participate in Council negotiations. The United Kingdom and Ireland can take part in the adoption of measures if they so wish. See further Chapter 3.5. – I also abstract from the rules on adoption of “acts” or “decisions” pursuant to the Qualification or Procedures Directive 9cf. number 62].

¹⁹² Cf. Article 63, first clause TEC.

¹⁹³ The term “initiative” does not appear in the same sense elsewhere in the Treaty. Bank 1999, p. 17n suggests that different from a proposal, an initiative does not have to state reasons.

¹⁹⁴ Article 63 first clause and Article 67(1) TEC speak of “five years after the entry into force of the Treaty of Amsterdam”, i.e. until 1 May 2004. The second arrangement was introduced by Article 2(4) of the Treaty of Nice, Article 67(5) of the consolidated version of the Treaty on European Community.

¹⁹⁵ As well as to measures based on Articles 63(3)(b) TEC: Article 1(2) of Council decision 2004/927/EC of 22 December 2004, *OJ* [2004] L396/45. This Decision does not affect decision-making on the issues meant in Articles 63(1) and (2)(a) TEC – cf. Preamble recital (4).

- ¹⁹⁶ The details of the procedure laid down in Article 251 TEC are not relevant for the present study; see on the co-decision procedure Craig and De Búrca 2003, pp. 144-147.
- ¹⁹⁷ Article 67(2) second indent TEC - but the Commission must “consider” any Member State request for proposing legislation.
- ¹⁹⁸ The Council stated rules on the exercise of this delegated legislative power by Council Decision 1999/468/EC, *OJ* [1999] L 184/23-26.
- ¹⁹⁹ But the *Initiative of Austria with a view to adopting a Council Regulation establishing the criteria for determining the States which qualify as safe third States for the purpose of taking the responsibility for examining an application for asylum lodged in a Member State by a third country national and drawing up a list of European safe third States* (presented 13 November 2002, *OJ* [2003] C17/6) may have had influence on the Procedures Directive, cf. number [527].
- ²⁰⁰ Article 213(1) TEC.
- ²⁰¹ Article 203(1) TEC.
- ²⁰² Cf. Noll 2000, p. 251.
- ²⁰³ Article 203(2) TEC.
- ²⁰⁴ Article 4 TEU.
- ²⁰⁵ *Ibid.*
- ²⁰⁶ The Council can consult these Committees, established by Article 7(2) TEC, when it deems it appropriate (Article 262 TEC). In a number of other areas than asylum law consultation is obligatory.
- ²⁰⁷ Cf. Articles 234 and 240 TEC.
- ²⁰⁸ Article 234 TEC, see Chapter 9.1.4.
- ²⁰⁹ Article 222 TEC.
- ²¹⁰ See Kuijper 1998, pp. 2-11 for relevant case law.
- ²¹¹ Already ECJ 29 November 1956, C-8/55, [1956] *ECR*, p. 245 (*Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*).
- ²¹² ECJ 5 February 1963, C-26/62, [1963] *ECR*, p. 3 (*Van Gend en Loos v. Nederlandse Administratie der Belastingen*).
- ²¹³ Bergerès 1998, p. 76.
- ²¹⁴ ECJ 4 December 1974, C-41/74, [1974] *ECR*, p. 1337 (*Van Duyn v. Home Office*), par. 12; cf. Craig & De Búrca 2003, p. 204.
- ²¹⁵ ECJ 26 February 1991, C-292/89, [1991] *ECR*, p. I-745 (*Antonissen*), par. 18.
- ²¹⁶ ECJ 21 September 1999, C-378/97, [1999] *ECR*, p. I-6207 (*Wijzenbeek*).
- ²¹⁷ Opinion A-G Cosmas 16 March 1999, C-378/97, [1999] *ECR*, p. I-6207 (*Wijzenbeek*), par. 54.
- ²¹⁸ Kuijper 1998, p. 9.
- ²¹⁹ ECJ 8 April 1976, C-43/75, [1976] *ECR*, p. 455 (*Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*), par. 57.
- ²²⁰ See, for example number [58] on the interpretation of Article 307 TEC in accordance with Article 30(4)(b) VTC.

- ²²¹ Kuijper 1998, p. 10.
- ²²² ECJ 4 October 2001, C-326/99, [2001] *ECR*, p. I-6831 (*Stichting “Goed Wonen” v. Staatssecretaris van Financiën*), par. 51 and CFI 28 February 2002, T-86/95, [2002] *ECR*, p. II-1011 (*Compagnie générale maritime and Others v. Commission*), pars. 250 and 289.
- ²²³ Cf. CFI 12 December 2000, T-128/98, [2000] *ECR*, p. II-3929 (*Aéroports de Paris v. Commission*), par. 50: “As regards [...], the argument that in the proposal for a directive on access to the market in groundhandling in Community airports the Commission had stated that groundhandling services formed an integral part of the air transport system, it is sufficient to state, first, that that particular view was not expressed by the Council in Directive 96/67 [...]”
- ²²⁴ Cf. ECJ 11 January 2001, C-1/99, [2001] *ECR*, p. I-207 (*Kofisa Italia Srl*), par. 40: “That interpretation is borne out by the fact that the Community legislation actually adopted differs in that regard from proposal 90/C 128/1 for a Council Regulation establishing a Community customs code submitted to the Council by the Commission on 21 March 1990 [...]”
- ²²⁵ CFI 28 February 2002, T-86/95, [2002] *ECR*, p. II-1011 (*Compagnie générale maritime and Others v. Commission*), par. 248. I found no reference to opinions issued by the Committee of the Regions. But as the Treaty accords the same status to both bodies, their opinions enjoy the same ranking.
- ²²⁶ Cf. *Antonissen*, see number [73].
- ²²⁷ Kuijper 1998, p. 11.
- ²²⁸ Cf. number [73] above.
- ²²⁹ ECJ 9 January 2003, C-257/00, [2003] *ECR*, p. I-345 (*Givane and Others*), par. 37.
- ²³⁰ ECJ 6 October 1982, C-283/81, [1982] *ECR*, p. 3415 (*Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*), par. 18.
- ²³¹ Cf. Articles 314 TEC and 53 TEU.
- ²³² Article 234 TEC, see Chapter 9.1.

Chapter 2

The working of international asylum law in European law

In this Chapter, I discuss whether and how far the Member States and Community institutions are bound to comply with international law on asylum when they adopt or apply European asylum law. Most international asylum law consists of treaty law binding the Member States (cf. paragraph 1.4.1). In paragraph 2.1, I address the question whether the transfer of powers on asylum matters to the Community (or the Union) has affected the scope or content of the Member States' obligations under international law, and how the Member States should solve conflicts between their obligations under European law and those under international asylum law. In paragraph 2.2, I address the various ways how international law may work in the Community legal order: as treaty or customary law, as general principles of Community law or by reference to primary or secondary Community law. In paragraph 2.3, the Charter of Fundamental Rights (and its successor, Part II of the Constitution for Europe) is addressed as far as its provisions have bearing on rights or obligations under international asylum law. Each paragraph ends with a summary of conclusions; in paragraph 2.4, I make some concluding observations.

2.1 The Member States as states party to international treaty law

2.1.1 The Vienna Treaty Convention rules on treaty conflicts

Pacta sunt servanda

[79] By the Treaty of Amsterdam, the Member States transferred powers on asylum to the European Community. Did the transfer of power on asylum to the European Community have consequences for the scope of the Member States' obligations under international asylum law? Relevant international law suggests that the Member States' obligations under international law remained unaltered after the conclusion or entry into force of the Treaty of Amsterdam.

According to the basic rule on the issue, *pacta sunt servanda*, states must keep to their agreements.¹ Changes to international asylum law can be brought only by the consent of all Contracting states, not by a treaty that only some of

those states conclude among each other. It is well-established customary law that *pacta tertiis nec nocent nec prosunt*, that is

“[a] treaty does not create either obligations or rights for a third State without its consent.”²

The states party to the Treaty on European Community form only a minority of the states party to the Refugee Convention, the Convention Against Torture, the Covenant on Civil and Political Rights or even the European Convention of Human Rights. No consent was asked from, let alone granted by the other, “third” states for any change to obligations under these instruments when the Treaty of Amsterdam was concluded. Therefore, the obligations of the Member States under the relevant treaties on asylum remained unaltered after the conclusion or entry into force of the Treaty of Amsterdam.³

Conflicts

[80] Thus, the Member States must comply with their obligations under international asylum law and these obligations are not altered by the Treaty of Amsterdam. But at least in theory, obligations under European asylum law may diverge from those under international asylum law. As a consequence, Member States may face conflicts between European asylum law and international asylum law. In this paragraph, I will discuss the rules on conflicts between European asylum law and international asylum law. The matter addressed here should be distinguished from the one addressed in Chapter 2.2: the question whether and if so, to what extent the *Community* is bound to comply with international law on asylum. That issue affects not only the acts of Community organs, but also acts of Member States as “executive agents” of the European Community. In this paragraph, I discuss the impact of Community law on the obligations of the Member States under international law, that is, in their capacity as states party to the instruments of international asylum law.

From the point of view of international law, in case of a conflict between an obligation under Community law and an obligation under, say, the Refugee Convention, the supranational character of the former is, in itself, not relevant: the conflict concerns obligations under two competing treaties, two instruments of international law. For relevant rules we may therefore turn to the Vienna Convention on the Law of Treaties. The applicability of these rules to the issue at stake presents no problems, as they codify, at least partially, customary law and international case-law.⁴ Further, the relevant rules are recognised and applied by the Court of Justice (see number [88]).

[81] The Vienna Treaty Convention provision that deals with treaty conflicts is Article 30. It states different rules for different types of conflict, using two parameters to distinguish types of conflict. First, the identity of the Contracting states involved - are they party to the same treaties or not? We observed above that apart from the Member States, many other states are party to the relevant instruments of international law. The second parameter concerns the “antecedence” of the concerned treaties, i.e. the question of which treaty was first. In our case, the antecedence does not present many problems. The relevant point in time is the moment of ratification of the treaty text.⁵ Competence on asylum was transferred to the Community by the Treaty of Amsterdam, concluded on 2 October 1997, and, where the new Member States are concerned, by the treaties on their accession, concluded on 16 April 2003.⁶ All Member States were party to the Refugee Convention, the Covenant, the Convention Against Torture and the European Convention of Human Rights well before the relevant moment, save for Belgium and Ireland – they had signed but not ratified the Convention Against Torture (see for the consequences of this belated ratification number [89]).

[82] From the perspective of international treaty law therefore, European asylum law stems from a treaty to which the international asylum law instruments are anterior agreements, to which third states are party. Article 30 VTC offers explicitly or implicitly two ways of solving conflicts in such a situation.

First, solution of the conflict by means of conciliatory interpretation, which is addressed in paragraph 2.1.2. Second, application of rules of precedence laid down in one of the concerned treaties. Rules on precedence may work in two ways. A rule may require precedence over other rules (see paragraph 2.1.3), or a treaty may grant precedence to other treaty law, that is, state that in case of a conflict with another treaty, the latter prevails. The Treaty on European Community indeed states such a rule, which is discussed in paragraph 2.1.4. In paragraph 2.1.5 I will address what happens if none of these devices solve the conflict. In paragraph 2.1.6, I discuss the case law of the European Court of Human Rights on conflicts between the European Convention and Community law.

2.1.2 Conciliatory interpretation

[83] According to Article 30(2) VTC,
“When a treaty specifies that it is subject to, or that it is not to be consi-

dered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”

Article 307 TEC *expressis verbis* states that the provisions of the Treaty on European Community do not affect certain anterior agreements (see paragraph 2.1.4). Brownlie and Mus argue, however, that in the absence of such an explicit provision (or if such a provision does not apply), the solution of Article 30(2) VTC may also apply: in case interpretation of a treaty leads to the conclusion that it cedes precedence to another treaty.⁷ Although the text of the Vienna Convention does not necessarily imply so, it certainly does not rule out this wider scope.⁸ Moreover, the Article’s position immediately before the Articles 31 and 32 on treaty interpretation imply that Article 30(2) VTC may apply and the preparatory works, especially the International Law Commission (henceforth also: ILC) reports put it beyond doubt.⁹

[84] Does the treaty on European Community grant precedence to the instruments of international asylum law in this implicit way? Here, the references to relevant international law in the Articles 6(2) TEU, 63 under (1) and 63 second last clause TEC are of interest. According to these provisions, the Community “respects” relevant human rights law, legislation based on Article 63(1) must be “in accordance with” relevant international law and legislation based on Article 63(3) and (4) TEC must be “compatible” with international agreements. Scope and content of the commitment to international asylum law pursuant to these Treaty provisions will be discussed in more detail below (paragraphs 2.2.4 and 2.2.5). At present, we are concerned with the light these provisions shed on the intentions of the Member States as masters of the Treaty on European Community. By means of these references, they very explicitly affirmed their anterior obligations under international asylum law:¹⁰ they did not intend that the transfer of obligations would impair those international law obligations.

2.1.3 Jus cogens

[85] Precedence for rules of international law may be claimed by the instrument that states the rule.¹¹ The treaties relevant for asylum do not contain clauses that require precedence. Rules of international asylum law may nevertheless enjoy precedence pursuant to general international law if they rank as peremptory norms, or *jus cogens*.

According to Articles 53 and 64 VTC, a treaty that is in conflict with an

anterior or posterior “peremptory norm” or rule of *jus cogens* is void. A peremptory norm is defined as

“a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.¹²

Requisite for a *jus cogens* norm is hence a twofold *opinio juris*: firstly, a vast and representative majority of states must consider that the rule is binding, and secondly, they must hold that the rule does not allow for derogation.

[86] Do rules of international law relevant for asylum fulfil these requirements? A few authors argue that Article 33 RC does so.¹³ Assuming that Article 33 RC has been accepted by the international Community as a whole,¹⁴ we should consider the other requirement for peremptory character: that it does not allow for derogation. There are two reasons for considering that Article 33 RC does allow for derogation. First, Article 33(2) RC allows for *refoulement* of refugees who are a danger to national security or public order. Allain states that these exceptions do not deny peremptory character to the provision, as states should observe the principle of proportionality when they apply these exceptions.¹⁵ Even if it were true that a proportionality test applies,¹⁶ this would rather indicate that the rule is not peremptory, for, according to the ILC Draft Articles on State Responsibility, applicability of a proportionality test to a provision precludes *jus cogens* character.¹⁷ No *jus cogens* “core” can hence be distinguished within Article 33 RC.¹⁸

And second, there are not sufficient indications of *opinio juris* that the provision does rank as *jus cogens*. As far as I know only one has explicitly expressed the opinion that the rule has peremptory character.¹⁹ The other indications for *opinio juris* that have been adduced are not convincing.²⁰

In summary, there are not sufficient grounds to assume that Article 33 RC has peremptory force.

2.1.4 Article 307 TEC

[87] Pursuant to Article 30(2) VTC, when a treaty states that “it is not to be considered as incompatible with an earlier or later treaty”, the other treaty has precedence. According to Article 307 TEC,

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession,

between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.”²¹ Obligations flowing from certain earlier agreements under international law hence enjoy precedence over obligations under Community law. The provision may therefore be relevant for conflicts between European asylum law and international asylum law, but, in order to assess how relevant, we must address two issues. First, the scope of agreements under international law to which the provision applies. Second, the scope of rights and obligations under Article 307 TEC.

Scope of anterior agreements

[88] The rule of precedence laid down in Article 307 TEC applies to “agreements”. The Court of Justice has never ruled on the applicability of the provision to agreements on asylum or even agreements on human rights. But according to its well-established case-law,

“Article 234 [now 307, HB] of the Treaty is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting application of the Treaty”.²²

Hence, international asylum law is not excluded *ratione materiae* from the scope of the provision.

The provision grants precedence to “agreements” dating from before the entry into force of the Treaty on European Community in 1958, as far as the original six Member States are concerned. This time limit seems to exclude application of Article 307 TEC to the 1967 Protocol to the Refugee Convention, the Covenant on Civil and Political Rights (concluded in 1966), and the Convention Against Torture (concluded in 1984). But arguably, read in the context and to object and purpose and in the light of relevant rules of international law, Article 307 TEC cedes precedence to agreements that are anterior to the Treaty of Amsterdam (concluded in 1997). According to Article 307 TEC, for states that later acceded to the European Community, the relevant date is the date of accession. This shows that the relevant moment is not the date of birth of the European Economic Community, but the moment of transfer of power to it. Holding otherwise would create an odd asymmetry in the application of Article 307 TEC between the six original Member States and those that acceded later – an unreasonable result.

Further, it follows from case-law of the Court of Justice that

“the purpose of the first paragraph of Article 234 [now 307, HB] of the Treaty is to make it clear, in accordance with the principles of international law (see, in that connection, Article 30(4)(b) of the 1969 Vienna

Convention on the Law of Treaties), that application of the EC Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder.”²³

Article 30 VTC is, according to its heading, concerned with successive treaties relating to the same “subject matter”. Thus, the purpose of Article 307 TEC is to make “clear” that application of the Treaty on European Community does not affect the duty to perform under a “prior agreement” on the same subject matter.

It is therefore the transfer of competence on the relevant “subject matter”. Another outcome would be incompatible with the principles of international law concerned here, *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt*. When concluding agreements with the Member States on issues that lie outside the scope of competence of the European Community, third states do not have to reckon with an eventual future transfer of power on that issue to the European Community.

In sum, where the competencies on asylum are concerned, Article 307 TEC should be read as follows. For the ten Member States that acceded on 1 May 2004, Article 307 TEC cedes precedence to agreements that they concluded before that date (or to which they acceded before that date). According to Article 307 TEC read in its context, to object and purpose and in conjunction with the relevant principles of international law, for the other fifteen Member States the relevant date is 1 May 1999, the entry into force of the Treaty of Amsterdam.

[89] Which of the instruments of international asylum law were concluded before 1 May 1999, or 1 May 2004, as far as the ten new Member States are concerned? All twenty-five Member States were party to the Refugee Convention, the 1967 Protocol, the Covenant on Civil and Political Rights and the European Convention on Human Rights before 1 May 1999.²⁴

As to the Convention Against Torture, all Member States were party to it before 1999, except for Belgium and Ireland that ratified it only on 25 July 1999 and 11 May 2002. This begs the question whether the latter two states can invoke Article 307 TEC and withdraw from Community law obligations if they collide with their obligations under this Convention. The Court of Justice has never ruled on the question at which moment exactly an agreement is “concluded” for the purposes of Article 307 TEC. Belgium and Ireland signed the Convention Against Torture already in 1985 and 1992.²⁵ The Vienna Convention on the Law of Treaties does not define the term “conclusion”, but

it follows from Article 8 read in conjunction with Article 7 VTC that the term “conclusion” encompasses the “adoption” or the “authentication” of the agreement.²⁶ And according to Article 18 VTC,

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: [...] (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed”.

It follows that Belgium and Ireland had obligations towards (among others) non-Member States flowing from the Convention Against Torture before the entry into force of the Treaty of Amsterdam. In accordance with the applicable rules of international law, Article 307 TEC therefore also cedes precedence to the Convention Against Torture where Belgium and Ireland are concerned.

Scope of obligations under Article 307 TEC

[90] What does the precedence that Article 307 TEC grants to anterior agreements entail? According to the first paragraph of the provision, “rights and obligations” flowing from these agreements are not “affected” by the Treaty. The “rights” are those of third states, not rights that Member States have under the anterior international agreement; correspondingly, the “obligations” meant in the Article are those of the Member States.²⁷ If the obligation concerns the granting of rights to individuals, the latter can rely on the provision on the same footing as third states:

“since the purpose of the first paragraph of Article 234 [now 307, HB] is to remove any obstacle to the performance of agreements previously concluded with non-member countries which the accession of a Member State to the Community may present, it cannot have the effect of altering the nature of the rights which may flow from such agreements. From that it follows that that provision does not [...] adversely affect the rights which individuals may derive from such an agreement.”²⁸

It follows that if a rule of European asylum law “adversely affects” an alien’s rights deriving from international asylum law, he can ensure performance of those rights by appeal to Article 307 TEC.

[91] Remarkably, Article 307 TEC, first paragraph, also entails obligations for the European Community. In *Burgoa* the Court considered that Article 307, read to its purpose, imposes upon the Community institutions the obligation “not to impede” the Member States’ obligations under prior international agreements.²⁹ To be sure, the Community does not take over the Member States’ obligations under these agreements³⁰ (the topic to be discussed in para-

graph 2.2.1). The obligation is restricted to taking due account of those prior obligations under international law.

[92] Finally, in what sense does Article 307 TEC protect rights derived from international agreements from being “afflicted” by Community law? The Court of Justice ruled in *Lévy* that when confronted with colliding obligations, the domestic court

“is under an obligation to ensure that [the directive provision concerned] is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty”.³¹

Thus, in case of a conflict, the Community law obligation does not apply. The extent of the obligation under the anterior agreement, and hence the existence of a collision, are to be decided upon by the domestic court, not by the Court of Justice.³²

[93] It appears that Article 307 first paragraph grants precedence to virtually all international asylum law, and that aliens can hence rely on international asylum law in case of a collision with Community law. There are, however, two caveats. First, according to the second paragraph of Article 307 TEC,

“To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.”

In *Commission v Portugal*, the Court of Justice ruled that this obligation to “take all appropriate steps to eliminate the incompatibilities established” may under circumstances entail a duty to adjust or, if necessary, even denounce the anterior agreement.³³ Thus, in case of a collision of Community law with instruments of international law that the Member States cannot solve in any other way, Member States may face the obligation to “adjust” or denounce those instruments. But such a situation is not likely to occur with the present state of European asylum law, as it implies few, if any obligations for the Member States that conflict with their obligations under international law (see number [675]). Moreover, we should note that the Court speaks of the obligation to denounce as a way to solve the conflict “that cannot be excluded”, hence as an *ultimum remedium*. Furthermore, the case of *Commission v Portugal* concerned an agreement binding only one Member State, and moreover an agreement that had adverse effects on the freedom of movement. Most

international asylum law binds all Member States, and is not in opposition to but rather reinforced by primary Community law (Articles 6(2) TEU and 63(1) TEC). Therefore, when a collision between Community law and asylum law threatens to occur, the obligation of the Community “not to impede” performance by the Member States of their obligations under international asylum law becomes especially prominent.

Secondly and importantly, it may be argued that Member States cannot invoke Article 307 TEC when their obligations under international law collide with obligations that flow from legislation adopted on the basis of in particular Article 63(1) TEC. This issue will be discussed in paragraph 9.4.

2.1.5 Insoluble conflicts

[94] In case the above-mentioned devices for solving conflicts do not apply, the Member States face a conflict for which international law on treaties does not offer a solution.³⁴ Third (non-Member) states that are party to the instruments of international asylum law can require performance, according to Article 30(4)(b) VTC:

“When the parties to the later treaty do not include all the parties to the earlier one:

[...]

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

But this circumstance does not affect the obligation to perform under the Treaty, for Article 30(5) VTC stipulates that

“Paragraph 4 is without prejudice to (...) any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty”.

So it follows from the rules on conflict laid down in the Vienna Treaty Convention that in case of a conflict between European law and international asylum law that cannot be solved by conciliatory interpretation or by Article 307 TEC, the Member States are responsible under both treaties.

In the absence of international law that solves this type of conflict, the matter is left to domestic law. One way out of this predicament might be political negotiations. The *Soering* case provides for an example.³⁵ Jens Soering had committed murder in the USA, for which he could be sentenced to death, and

fled to the United Kingdom. The United States required his extradition from the United Kingdom under an extradition agreement between the two states. The European Court of Human Rights however ruled that as a result of extradition, Soering ran a real risk of being exposed to death row, which would amount to a breach of Article 3 ECHR (). Hence, the United Kingdom faced a treaty conflict that could not be solved by application of the Vienna Treaty Convention: it was bound to observe the European Convention and hence not to extradite Soering, but the United States could require performance under the extradition agreement, which was not affected by the UK's ratification of the European Convention. Eventually, the United Kingdom obtained the commitment from the United States that Soering would not be exposed to death row, which allowed it to extradite the man without violating Article 3 ECHR.

In other cases, such a solution may not be at hand and the Member State that faces the conflict may have to decide to comply with one treaty and violate the other one. No rule of international law suggests that in such a situation it should rather comply with instruments international asylum law than with the Treaty on European Community, or vice versa.

2.1.6 The European Court of Human Rights

It follows from the Vienna Treaty Convention that the transfer of powers to the Community has no consequences for the scope of the Member States' obligations under international asylum law. Do the bodies that monitor state performance under the instruments of international asylum law hold the same view? Neither the Human Rights Committee nor the Committee Against Torture has ever addressed the question, as far as I know. The European Court of Human Rights on the other hand has done on several occasions, and quite recently issued a very principled judgement on the matter: the Grand Chamber Judgement *Bosphorus v Ireland*.³⁶ Before addressing this judgement I will first discuss the European Court's previous rulings on the matter.

[95] The scope of Member State responsibility under the European Convention of Human Rights is determined by Article 1: Member States must "secure" the rights laid down in the European Convention to persons "within their jurisdiction". In a number of cases, the Strasbourg organs had to decide on complaints about acts by Member States that were conditioned by Community law, where the involved Member States stated that they could not be held responsible for acts of Community institutions. In the terms of Article

1 ECHR, those states argued that these acts fell outside scope of their “jurisdiction”; in the terms of the Vienna Convention on the Law of Treaties, they argued that the posterior Treaty on European Community had altered the scope of their obligations under the European Convention.³⁷

The Court addressed the matter at length in *Matthews v UK*.³⁸ The act that Mathews complained of was the refusal to register her as a voter in the elections for the European Parliament (and this refusal was allegedly in breach of Article 3 of the First Protocol attached to the European Convention on Human Rights).³⁹ The decision by the UK authorities to refuse the registration was based on an agreement (the “1976 Act”) that in its turn was based on a Council decision and that left the United Kingdom no discretion.⁴⁰ The United Kingdom stated that the impugned act was conditioned by Community law completely, “and could not be revoked or varied unilaterally by the United Kingdom”; therefore, control by the United Kingdom authorities’ was not “effective”, and for that reason did not amount to “jurisdiction” as meant in Article 1 ECHR.⁴¹

The Court did not follow this reasoning. Having observed that the United Kingdom exerts territorial jurisdiction in the sense of Article 1 ECHR over Gibraltar, the Court still had to

“consider whether, notwithstanding the nature of the elections to the European Parliament as an organ of the EC, the United Kingdom can be held responsible under Article 1 of the Convention for the absence of elections to the European Parliament in Gibraltar, that is, whether the United Kingdom is required to “secure” elections to the European Parliament notwithstanding the Community character of those elections. [...] The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be “secured”. Member States’ responsibility therefore continues even after such a transfer. [...] Legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly. To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to “secure” the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be “secured” in respect of purely domestic legislation. In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom’s responsibility derives from its having entered into

treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act.⁷⁴²

Hence, the Contracting states cannot change the scope of their obligations under Article 1 ECHR by “subsequent” agreements. If a subsequent agreement entails that the state loses in fact control over an act, its control remains nevertheless “effective” for the purposes of Article 1 ECHR. As a consequence, as far as responsibility under the European Convention is concerned, there is no difference between Community legislation and domestic legislation.

[96] The Court adopted the same approach in a number of subsequent rulings. Of particular interest for asylum law is the Court’s decision on admissibility *T.I. v UK*.⁴³ It concerned the decision by the United Kingdom to remove an asylum seeker to Germany. T.I. stated that this removal was in breach of Article 3 ECHR, as it was likely that Germany would expel him to Sri Lanka where he would suffer inhuman or degrading treatment or torture. The United Kingdom held that it could rely on the Dublin Convention, according to which Germany would examine the case; it was therefore certain that the prohibition of *refoulement* ex Article 3 ECHR would be observed. The European Court of Human Rights rejected this argument:

“[w]here States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution (see e.g. *Waite and Kennedy v. Germany* judgment of 18 February 1999, *Reports* 1999, § 67)”⁴⁴

The last sentence is a word for word quote from the judgement *Waite and Kennedy*.⁴⁵ This quote is somewhat ambiguous, for in *Waite and Kennedy*, the “attribution” concerned attribution of competencies and immunity to an international organisation (the European Space Agency),⁴⁶ whereas in *T.I. v UK* the “attribution” concerns the transfer of responsibility for the examination of the asylum claim to another state. However this may be, the decision fits in well with the approach adopted in *Matthews*. It would seem to follow that by attributing the competence to legislate on asylum to the Community, the Member States are not absolved from their responsibility under the European Convention of Human Rights.

[97] In the judgement *Bosphorus v Ireland*, however, the Court ruled that transfer of powers does after all influence the extent of Member State responsibility under the Convention. The circumstances of the case were as follows. In 1992, the Turkish firm Bosphorus had leased an aircraft from Yugoslav Airlines. Shortly thereafter, in view of the escalating war in Yugoslavia, the United Nations Security Council adopted a resolution calling for sanctions against the Former Republic of Yugoslavia, *inter alia* impoundment of aircraft. The European Community implemented this sanction and adopted a Regulation that obliged the Member States to impound all aircraft owned or controlled by undertakings from the Former Republic of Yugoslavia (such as Yugoslav Airlines). When Irish authorities complying with the Regulation impounded Bosphorus' aircraft, the firm complained that its right to "peaceful enjoyment of its possessions" (here: enjoying the benefits from its lease) as protected by Article 1 ECHR Prot 1 had been violated.

As to the scope of Ireland's obligations under Article 1 ECHR, the Court stated

"[...] that a State's jurisdictional competence is considered primarily territorial [...], a jurisdiction presumed to be exercised throughout the State's territory [...]."⁴⁷

As the act complained of was executed by "the authorities of the respondent State on its territory", the firm fell within Irish jurisdiction for the purposes of Article 1 ECHR – just as was decided in *Matthews*. But in marked distinction from *Matthews*, the Court did not proceed in *Bosphorus* to address the other element of the provision, the obligation to "secure" Convention rights. It rather observed that considerations concerning "the scope of the responsibility of the respondent state go to the merits of the complaint under Article 1 of Protocol No. 1".

[98] Article 1 ECHR Prot 1 prohibits interference with the peaceful enjoyment of one's possessions, except (*inter alia*) when control of the use of a property is necessary in the common interest. Having found that an "interference" with Bosphorus' right to peaceful enjoyment of its property had taken place, the Court addressed the legal basis for this interference and found, that

"the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EC law".⁴⁸

Subsequently, it addressed the question whether or not the impoundment was justified, that is, whether Ireland had struck a fair balance between the gene-

ral interest and the interests of Bosphorus. The Court identified compliance with Community obligations as the general interest pursued by Ireland.

In order to decide whether compliance with Community obligations did justify the interference with Bosphorus' right to peaceful enjoyment of its property, the Court had to "reconcile" two "positions" or rather, two competing interests: "the interest of international co-operation" and "the Convention's role as a "constitutional instrument of European public order" in the field of human rights."⁴⁹

How are these interests to be reconciled? The Court states that

"In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States *completely* from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards ([...] *Waite and Kennedy*, at § 67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention [...; emphasis added, HB]."⁵⁰

[98a] Thus far, the reasoning seems quite similar to that in *Matthews* and *Waite and Kennedy*: the Member States are and remain liable under the European Convention when they apply Community law that leaves them no discretion (in the terms of *Matthews*: over which they exert no effective control). There is however an important modification. In *Waite and Kennedy* and *T.I. v UK*, the Court ruled that a transfer of powers could not "absolve" the Member States from their obligations under the Convention.⁵¹ In contrast, in the above-cited consideration in *Bosphorus* the Court states that Member States are not *completely* absolved from their Convention obligations when complying with Community law – but they may be *partially* absolved. Indeed, the Court does draw a distinction between "full responsibility" and partial responsibility. Member States are "fully responsible" *inter alia* when they implement Community law that leaves them some discretion⁵² – in the terms of *Matthews*, when they keep (a certain amount of) effective control. But if Community law leaves them no discretion, their responsibility is partial – as in the case of *Bosphorus*.

What does this partial responsibility entail?

"In the Court's view, State action taken in compliance with such legal obli-

gations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.”⁵³

Thus, if and in so far as the Community legal order provides for protection of fundamental rights that is “equivalent” to that under the European Convention, Member States are absolved from their responsibility, their obligations under that Convention, unless the applicant can show that in the particular circumstances of his case this protection was “manifestly deficient”.

[98b] The notion of “equivalent protection” as applied by the Court in *Bosphorus* addresses both material guarantees *and* protection mechanisms, i.e. judicial control over compliance with those guarantees. The material fundamental rights standards that apply within the Community legal order are addressed in paragraph 2.2, the Community system of judicial control in Chapter 9. I will therefore address the “equivalent protection” criterion and its application later, in paragraph 9.5.2. Here, we are concerned with the implications of the *Bosphorus* judgement for the effect of Community law obligations on the scope of Member States’ obligations under the European Convention.

Bosphorus endorses the *pacta tertiis* rule (cf. number [80]) as the basic rule on the relation between obligations under the European Convention and those under the Treaty on European community: Member States are “considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention”.⁵⁴ But complaints of breaches of Convention rights by Member State acts complying with Community obligations that leave no discretion are susceptible to review only if they meet the “manifest deficiency” test. As this test does not apply to complaints of other acts by the Member States, or to any act by Contracting parties that are not Member States of the European Union, the subsequent treaty did bring change to state responsibility under the European Convention.

Does this change detract from the basic principle, the *pacta tertiis* rule? One may maintain that this conditional suspension of responsibility under

Convention does not alter content or scope of the Member States' commitments under the ECHR, as the condition (the equivalent protection) requires that those obligations are materially complied with. Arguably, though, this view is flawed. In *Bosphorus* the Court states that for the purposes of the "equivalent protection" criterion,

"By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued."⁵⁵

The *pacta tertiis* rule however requires that protection of Convention rights should remain unaltered, hence "identical" after the transfer of power to the Community. Arguably, then, the very notion of "equivalent protection" is at odds with it. And in paragraph 9.5.2, I will argue that the same holds true for its application by the Court - "protection" of fundamental rights in the Community is not even "comparable" to that under the Convention.

[98c] In summary, it follows from *Bosphorus* that obligations under Community law do affect Member States' responsibilities under the Convention. The implications of this judgement for European asylum law are, however, very modest for two reasons. First, the restriction on Member States' responsibilities formulated in *Bosphorus* applies only when Community law leaves Member States no discretion – as we will see, a type of case that could only very rarely, if ever, occur under present European asylum law (cf. number [223]). Second, it is unclear whether the "equivalent protection" approach would also apply to the Convention provision most relevant for asylum law – Article 3, the prohibition on (expulsion resulting in) ill treatment. In *Bosphorus*, the Court first establishes that an interference with the applicant's right has taken place. Here, the scrutiny is full – the European Court does not apply a "manifest deficiency" test to the qualification of the Member State's act as an interference. Subsequently it addresses Ireland's duty to comply with Community legal obligations (that partially absolve Ireland from its responsibility under the Convention) as a justification for the interference. According to well-established case-law, the prohibition laid down in Article 3 ECHR is "absolute": once it has been established that a state "interfered" with this right, no justification is possible. Obviously, in Article 3 ECHR cases the Court could apply the "equivalent protection" approach to the determination of the scope of responsibility under Article 1 ECHR. But if so, why does the definition of scope in Article 1 ECHR not apply in case Article 1 of Protocol 1 ECHR is appealed to? Should we infer that the scope of responsibility under Article 3 ECHR is different from the one that applies to right to enjoyment of

property? Whatever the answer may be, it is clear that the definition of Member States' responsibilities under the Convention set out in *Bosphorus* cannot simply be transposed to *refoulement* cases.

2.1.7 Conclusions

[99] In this paragraph, I have addressed the question of whether the scope of obligations of the Member States under international law is affected by the transfer of powers to the Community by the Treaty of Amsterdam. All instruments of international asylum law are anterior to the Treaty of Amsterdam, and non Member States are party to them. It follows from international treaty law that the conclusion of the Treaty of Amsterdam therefore could not alter scope or content of obligations under the former instruments. The matter may be different however as far as the European Convention of Human Rights is concerned. It follows from the European Court of Human Rights' judgement *Bosphorus* that as the Community provides for human rights protection that is "equivalent" (in fact, "comparable") to that under the Convention, member states are responsible under certain Convention provisions for acts that implement Community law that leaves them no discretion only if in the particular circumstances of the case, human rights protection was manifestly deficient. It is unclear whether or not this reasoning applies to the prohibition of *refoulement* ex Article 3 ECHR. Moreover, there is little if any European asylum law that does not leave discretion.

For practical purposes, two rules of treaty law are relevant. First, Article 30(2) VTC read in conjunction with Articles 6(2) TEU and 63 under (1) and second last clause TEC implies that European law on asylum should be interpreted in accordance with international human rights law. Second, Article 307 TEC grants precedence to agreements that are anterior to the Treaty of Amsterdam (or to the treaties of accession for the Member States that acceded later) - in fact, to all treaties relevant for international asylum law. Article 307 TEC has the effect that third states party to such anterior agreements, as well as individuals who derive rights from those agreements, can rely on those agreements. Article 307 TEC enables the Member States to comply with their international asylum law obligations, and entails for the Community itself the obligation "not to impede" such performance. To a very considerable extent, Article 307 TEC seems to solve conflicts that may emerge between European and international asylum law.

However, the provision may not solve any conflict where European asylum

law is involved. Then, Member States are responsible under both treaties – a situation for which the Vienna Treaty Convention does not offer a solution.

For the present, conflicts between international and European asylum law are highly improbable. One reason is that the concerned rules of international law work within the Community legal order. To a considerable extent, Community law sustains rather than impedes Member States' performance of international asylum obligations. How international asylum law works within the Community legal order is the subject of paragraph 2.2. Another reason is the character of most European asylum law: it states 'minimum standards' that cannot impose obligations that conflict with obligations under international law, as we will see in paragraph 3.4.

2.2 The working of international asylum law within the Community legal order

[100] In the previous paragraph, we discussed how far the Member States are bound by international asylum law when they act within the sphere of Community law, according to the rules of treaty law. The discussion therefore concerned scope and content of their responsibility in their capacity as subjects of international law. In the present paragraph, we will discuss to what extent the Community is bound to comply with international asylum law. The discussion concerns obligations that rest on Community institutions, such as the Council and the Commission, but also obligations for the Member States as executive organs of the Community, when they implement or apply Community law.

The discussion is structured as follows. In paragraph 2.2.1 I discuss how far the Community as a subject of international law must comply with rules of international law on asylum. It concerns the working of international treaty law and customary law within the Community legal order, as well as substitution of Member States' obligations under international law by the Community. As we will see, the scope of obligations of the Community as a subject of international law on asylum is very modest.

Therefore, other ways in which international law may affect Community law must be addressed. Article 63 TEC requires that asylum measures based on its paragraphs (1) and (3) are "in accordance" or "compatible" with international asylum law. No such reference applies to Article 63(2) TEC, but

general principles of Community law imply similar obligations. As the well-established case law of the Court of Justice sheds light on the references to international law in Article 63 TEC, the discussion of these general principles in paragraph 2.2.2 precedes the discussion of Article 63 TEC, in paragraph 2.2.3. Obligations by virtue of references to international law in secondary Community law are briefly addressed in paragraph 2.2.4, and alternative models for construing obligations of the Community under international law in paragraph 2.2.5.

2.2.1 Effect as international law

International law has effect within the Community legal order in various ways. First of all, the Community is bound by treaties to which it is party. Secondly, it can become bound to treaties to which all Member States are party. And thirdly, certain rules of customary nature bind the Community.

Treaty law

[101] As the Community has legal personality,⁵⁶ it is able to conclude agreements under international law. But it did not accede to any instrument of international law relevant for asylum. Treaties to which the Community has not acceded do not serve as a source for review of legality of Community acts.⁵⁷ Hence, individuals cannot invoke rules of international asylum law on this footing against Community acts.

[102] Could the European Community accede to the relevant treaties in the future? At present, accession is not possible. All relevant treaties allow only states as parties, not international organisations.⁵⁸ Besides, the Court of Justice has stated that the Treaty on European Community should make explicit provision for accession to the European Convention of Human Rights, which the present Treaty does not.⁵⁹

But in the future, this may change, as far as the European Convention of Human Rights is concerned. After the entry into force of the 14th Protocol, the European Convention of Human Rights will be open for accession by the Union.⁶⁰ And according to Article 9(2) of the Constitution for Europe,

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

Would the Union be competent to accede to other instruments of international asylum law as well? According to an explanation to Article 9(2) CfE from the

Praesidium of the Convention that drafted it, the provision does not imply that the Union could never accede to other human rights treaties.⁶¹ Still, amendment of those treaties would be necessary to make accession of international organisations possible.

Substitution

[103] For the present as well as the near future, then, the Community is not bound under international treaty law to any of the instruments of international asylum law. But by substitution, the Community can take over rights and obligations flowing from treaties to which the Member States are party. In the case of *International Fruit III*, the Court of Justice ruled that

“in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community”,

although it had not signed this instrument.⁶² The Court based its conclusion that “substitution” of the Member States by the Community had taken place on two grounds. First, the Member States’ apparent willingness to bind the Community to the GATT and second, the apparent acceptance of the Community by the other states party to the GATT (not part to the EC).⁶³

The willingness to bind the Community appeared from the complete and definite transfer of power on the subject matter covered by the GATT (international trade) in the Treaty on European Community.⁶⁴ Article 110 TEC(old) showed that the establishment of the Community pursues the objectives of the GATT, and the intention of the Member States to bind the Community further followed from declarations to that effect to the other states party to the GATT.⁶⁵ That the other states party to the GATT had accepted the Community as a party, followed from their “recognition” and from the fact that they accepted that the Community appeared in negotiations on agreements within the GATT framework.⁶⁶

[104] Is the Community bound to international asylum law by substitution according to the conditions set by the Court in *International Fruit*? As to the first condition, Article 63(1) first clause TEC requires that measures on asylum be “in accordance with the [Refugee Convention]”. This clause bears witness to a willingness on the part of the Member States to bind the Community to international asylum law; so the first of the two criteria in *International Fruit* seems satisfied. Still, in this respect a major difference with the GATT situation must be noted. The transfer of power on asylum measures is far from complete. In most of these areas concerning asylum, the Community is com-

petent to adopt only “standards”, which implies that the competence to grant asylum and so on has not been transferred. Most of those standards are “minimum standards” at that, which implies that Member States remain competent to set additional domestic standards (see numbers [218], [256]- [258]). Article 63(1) TEC is therefore not indicative of the will of the Member States to impose upon the Community the obligations they have under international asylum law, for example, to make sure the principle of *refoulement* is respected throughout the European Union.

Will this be different under the Constitution for Europe? The scope of Union competence on asylum matters in the Constitution for Europe is considerably broader than the present scope of Community powers on the matter, but not complete (cf. number [231]). In particular, Article 266(2)(g) explicitly states that examination of requests is the “responsibility” of Member States, not of the Union (cf. number [240]). Hence, the Constitution does not express the will of the Member States that the Union takes over their responsibilities under international asylum law.

As to the second requirement, there is no indication whatsoever that the third states party to the relevant instruments of international law accepted substitution of the Member States’ obligations to the Community. The Community never played any role in any of the conventions on asylum, nor in the bodies linked to those conventions. It follows that the EC is not bound to international asylum by substitution.

Several authors have proposed variants of the substitution model according to which the Community is bound to comply with international law. These are not reflected in the case law of the Court of Justice. They will be discussed in par. 2.2.5.

Custom

[105] Rules of international customary law do work within the Community legal order. In its judgement *Van Duyn*, the Court observed that

“it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relation between Member States, that a state is precluded from refusing its own nationals the right of entry or residence”.⁶⁷ Thus, “principles of international law” which primary Community law “cannot be assumed to disregard” can be invoked. This reading is confirmed in *Foglia*, where the Court stated that

“in the absence of provisions of Community law on the matter, the possibility of taking proceedings before a national court against a Member State

other than that in which that court is situated depends both on the laws of the latter and on the principles of international law”.⁶⁸

In *Poulsen*, the Court went one step further.⁶⁹ In this case on the territorial scope of a regulation on the conservation of fisheries resources, the Court observed that

“the European Community must respect international law in the exercise of its powers and that, consequently, [the regulation provision] abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.”⁷⁰

So the Community must “respect international law”. This encompasses at any rate compliance with “customary international law”.⁷¹ The Court confirmed this in its judgement *Racke*, where it stated:

“It should be noted in that respect that, as is demonstrated by the Court’s judgment in (... ; *Poulsen*), the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country. It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.”⁷²

Apparently, international law that the Community must respect encompasses provisions of treaties to which it is not party but which codify custom (*Racke*), and custom that has not been codified (*Poulsen*).

[106] What are the consequences of this case law for European asylum law? It may be assumed that the prohibition of *refoulement* is a rule of international custom (cf. number [19]). Insofar as Articles 33 RC, 3 CAT, 7 CCPR and 3 ECHR express this rule of custom, they would apply within the Community legal order. But the scope and content of this customary rule of non-*refoulement* is indeterminate (number [19]). In *Racke*, the Court of Justice stated that

“because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.”⁷³

The content of the prohibition of *refoulement* laid down in treaty law suffers

far less from this “imprecision”, not in the least because of clarifications by treaty monitoring bodies. As we will see in the following paragraphs, through Articles 6(2) TEU and 63(1) TEC international treaty law on asylum serves very much as a standard for secondary Community law.

Conclusions

[107] The European Community is not bound to apply treaty law on asylum as it is not party to the relevant instruments. Nor has the Community taken over the relevant obligations from the Member States: the conditions set for such substitution in *International Fruit* are not met. Thus, there is no indication the third states party to the relevant conventions accepted the European Community as a party. Moreover, the transfer of power on asylum by the Treaty of Amsterdam (and the constitution for Europe, as to the Union) is only partial, and not complete, as *International Fruit* requires.

But it follows from the case law of the Court of Justice that the Community is bound to observe international custom (*Poulsen*). Hence, the customary prohibition of *refoulement* works within the Community legal order in its capacity as international law.

2.2.2 General principles of Community law

2.2.2.1 Introduction

[108] According to well-established case law of the Court of Justice, secondary Community law must comply with “general principles of Community law” that reflect international human rights law. The Court started testing Community measures to fundamental rights in the 1970’s.⁷⁴ At that time, the Treaty on European Community did not contain any provisions relating to human rights. The absence of Community law standards of human rights became problematic as the number of complaints that Community measures infringed on basic human rights that were protected under domestic or international law grew. Some domestic courts gave signs that if Community protection of human rights was absent, they were ready to offer this protection themselves. Evidently, testing Community law to fundamental rights in domestic constitutional law would threaten the uniform application of Community law.⁷⁵ The Court of Justice reacted by developing the concept of human rights protection as a principle of Community law. According to now firmly established case law of the Court,

“fundamental rights form an integral part of the general principles of Community law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention of Human Rights has special significance in that respect.”⁷⁶

Thus, in an appeal against Community law for alleged infringement upon human rights, only Community principles, not provisions from domestic (constitutional) law or international law can be invoked. As sources of “inspiration” for those Community principles however those domestic and international law provisions can in fact be invoked indirectly.

[109] The Court never indicated the Treaty basis of these Community principles. In academic writing the term “law” in Article 220 (ex 164) TEC has been suggested.⁷⁷ Since the Treaty of Amsterdam,⁷⁸ primary Community law does offer an explicit basis. According to Article 6 TEU,

“(2) The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”,

and Article 46 TEU provides that

“The provisions of the Treaty establishing the European Community [...] concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty: [...] (d) Article 6(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty”.

Thus, since 1999 primary European law offers a basis for testing Community acts to human rights. Do these provisions limit the Court’s jurisdiction? In some respects Article 6(2) TEU has a narrower scope than the Community principles as established by the Court had (cf. numbers [110] and [113]). Possibly, the Contracting states intended to reduce the scope of sources for the case-law of the Court of Justice on human rights by phrasing Article 6(2) as they did. If so, the Luxembourg Courts have not followed this lead. According to Luxembourg case-law, these codifications “embody”⁷⁹ or “reaffirm”⁸⁰ the principles of human rights protection set out in its case-law, and the Courts

apply these principles in the same way as they did before the entry into force of Article 6(2) and 46(d) TEU.

The case law on general principles has raised much comment.⁸¹ For the present study, three topics are of particular interest. First, the scope of international law the Court applies. Article 6(2) TEU mentions only one instrument of international law, the European Convention of Human Rights. Is scrutiny therefore restricted to the European Convention? This issue will be discussed in paragraph 2.2.2.2. The second topic that deserves attention is the scope of the Court's scrutiny. Obviously, acts by Community institutions are under human rights review from the Court. But Member States acts may also be subject to that review. The limits of the application of Article 6(2) TEU to Member States' acts will be discussed in paragraph 2.2.2.3. The third issue concerns the extent to which the relevant norms must be complied with. The Treaty speaks of "respect" for the European Convention of Human Rights, which might imply an obligation falling short of compliance. This issue will be discussed under paragraph 2.2.2.4. In paragraph 2.2.2.5 the main conclusions of the preceding paragraphs are summarised.

2.2.2.2 Sources

[110] Which rights are protected as "general principles of Community law"? Article 6(2) TEU refers to two sources of human rights law: "fundamental rights, as guaranteed by" the European Convention of Human Rights and "constitutional traditions common to the Member States". The provision does not explicitly require respect for fundamental rights laid down in the Refugee Convention, the Covenant of Civil and Political Rights and the Convention Against Torture. But before the entry into force of the provision, the Court occasionally invoked provisions from other treaties than the European Convention⁸² and it still feels free to do so:

"According to settled case-law, fundamental rights form an integral part of the general principles of law observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by *international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories*. The ECHR has special significance in that respect" [emphasis added; HB].⁸³

Indeed, for example the Covenant of Civil and Political Rights has been

applied since the entry into force of Article 6(2) TEU.⁸⁴ Consequently, notwithstanding the wording of Article 6(2) TEU, all “international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories” supply guidelines for the formation of the Community law fundamental rights.

[111] Which of the provisions of international law concerning asylum identified in Chapter 1.3.2 as the framework for European asylum law could constitute fundamental rights whose observance the Court ensures? Well-established are general principles on effective judicial protection, which are inspired by Articles 6 and 13 ECHR (see paragraphs 6.3.1 and 9.1.2). The other provisions of international asylum law never figured in the Court’s case-law. But in other connections, the Luxembourg Courts addressed the European Convention and the Protocols attached to it as well as the Covenant of Civil and Political Rights⁸⁵ as sources of fundamental rights. It was safe for the Court to base itself on them, as at the time of the concerned rulings all Member States were party to those conventions. The Refugee Convention and the Convention Against Torture have never been adduced as sources of fundamental rights before the Luxembourg Courts. But as all Member States are bound by them, nothing hinders their application. Hence, all rules of international law on asylum may serve as sources of inspiration for general principles of Community law.

[112] Could the other source of inspiration for general principles of community law, constitutional traditions common to the Member States, also be of relevance for asylum? In one respect, they may. In 2002, from the then fifteen Member States,⁸⁶ ten explicitly recognise a right to territorial asylum, and at least five of them laid down this right in their constitution.⁸⁷ The explicit recognition of the right to asylum in Article 18 of the Charter of Fundamental Rights may be read as a “reaffirmation” of this tradition (cf. number [159] below).

2.2.2.3 Scope of application

[113] According to Article 46(d) TEU, the powers of the Court of Justice apply “only” to Article 6(2) TEU “with regard to actions of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty”. Thus, the Court is competent to test decisions, regulations, directives and measures *sui generis* adopted by Community institutions to general principles of Community law.

Article 46(d) TEU does not explicitly confer a competence to the Court of Justice to apply Article 6(2) TEU to Member States' acts. But before as well as after the entry into force of the provision, the Court did apply Community principles on fundamental rights to Member States' acts. Apparently, Article 46(d) only partially codifies the Court's case law, analogous to the situation with the scope of Article 6(2) TEU.⁸⁸ The scope of application as to Member States' measures therefore has to be assessed on the basis of the Court's case law.⁸⁹

Which Member State acts fall within the scope of the Court's review of compliance with fundamental rights? The Court itself has applied various terms when defining the area of Community human rights review: "field of Community law",⁹⁰ "scope of Community law",⁹¹ and "field of application of Community law".⁹² It did not, however, indicate how the "field" and "scope" of Community law relate. In the English language version of some of its case-law the Court applied only the term "scope", whereas other language versions, notably the French, retain the distinction between the "field of application" ("*cadre du droit communautaire*") and the "scope" ("*champ d'application*").⁹³ It seems that the terms are applied interchangeably.⁹⁴ At any rate, the Court has never attached legal consequences to this distinction. Below, I will not distinguish between field and scope but apply the term "scope".

If the Court's terminology may be somewhat unclear, two categories of Member State acts to which the Court of Justice applies the Community principles can be neatly distinguished. First, Member State acts that serve to execute Community rules, and second, Member State acts that infringe upon the market freedoms.⁹⁵ I will discuss both categories subsequently below.

Review of implementation acts

[113] In the first situation, Member States act as "agents" or the "executive branch" of the Community.⁹⁶ In *Wachauf*, the Court ruled that Community principles concerning human rights do apply when Member States implement Community rules. The case concerned a regulation for milk quotas, providing for financial compensation if a farmer stops producing milk. The regulation stated that if a tenant farmer (lessee) applied for compensation, the lessor should give written consent. Wachauf was a lessee whose landlord had never contributed to the milk production, but refused to give consent. The German Federal Office refused compensation. The Court of Justice ruled that

"Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and

of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements”.⁹⁷ Thus, the Member States are bound to apply the Community principles when they implement Community rules.⁹⁸

The rationale for this extension of the scope of application of Community principles seems obvious. If review of compliance with these principles were restricted to Community measures, it would be quite easy for the Member States, the executive organs, to evade them when they implement those measures, and thus, in many cases, render the protection afforded by those principles meaningless. The Court could have relied on application of domestic or international human rights law provisions to the implementing measures by the domestic courts (for to be sure, the Court in fact applies the Member States’ own human rights standards to their own acts!). But if the Court had left this test to domestic courts, it would not have had any certainty that the states would apply these standards, and that they would equal the protection afforded by the Community principles. Moreover, leaving the matter to domestic law would threaten the uniform application of the concerned measures.⁹⁹

[114] The obligation to comply with Community principles on fundamental rights applies not only to regulations (as in *Wachauf*),¹⁰⁰ but also to legislation implementing directives¹⁰¹ and even opinions leading to a commission decision.¹⁰² Does it matter for the application of Community principles how much discretion the rule of Community law leaves the Member States?¹⁰³ I don’t think so. The question of compatibility with Community principles in *Wachauf* could come up only because the regulation did leave the Member States considerable discretion on attribution of the compensation to lessees. For if the regulation had mandated the deprivation, the regulation itself would have been found incompatible with the concerned Community principle.¹⁰⁴ And it follows from the judgment *Fogasa* that even if implementation is left explicitly to the Member States, it falls within the scope of Community law.¹⁰⁵ This case concerned a directive on the protection of employees in the case of insolvency, which obliged the Member States to “take the measures necessary to ensure that guarantee institutions guarantee payments” in case of insolvency of an applicant’s employer. Under Spanish law, employees could only get payments determined by judicial decision from the guarantee institution. This Spanish rule was challenged suc-

cessfully for breach of the Community principle of equality - although the directive explicitly left the definition of the term “payment” to national law. Thus, discretion is not a hindrance to application of Community principles to Member States’ acts. The only thing that matters is whether or not the national measure falls within the scope of the Community rule.

[115] Hence, the scope of review of implementation acts by Member States to general principles of Community law depends on the scope of application of the Community measure concerned. How must this scope be delimited? The Court’s reasoning in *Maurin* offers some guidance.¹⁰⁶

Maurin was charged with selling food after the expiry of the use-by date. He stated that the domestic criminal proceedings that followed were in breach of some procedural right protected by the European Convention of Human Rights. The referring French court asked the Court of Justice whether the relevant French criminal law was compatible with the relevant Community law principles. Thus, the Court of Justice had to decide whether or not the national legislation fell within or outside the scope of Community law. It assessed the scope of the invoked Community measure, the directive on the labelling of foodstuffs, in two steps. First, it observed that the directive represented, according to its Preamble,

“the initial stage of a harmonization process which is designed progressively to eliminate all obstacles to the free movement of foodstuffs resulting from the differences [...] with respect to the labelling of those products.”¹⁰⁷

Secondly, it observed that the directive provided that the use-by date must be indicated on food-stuffs, but that the directive contained no provisions on sale of foodstuffs complying with the provisions on labelling. It concluded that the national legislation concerned fell outside the directive’s scope and hence, the scope of Community law.

Hence, the limited degree of harmonisation envisaged by the directive restricted its scope to the issues it explicitly addressed. And as we will see, most of European asylum legislation is likewise explicitly restricted in scope. For example, the prohibition on expulsion ex Article 3 ECHR for “humanitarian” reasons as meant in the judgement *D v UK* by the Strasbourg court is not addressed by the Community rules on interpretation and application of Article 3 ECHR (see number [296]). In view of the degree of harmonisation that the Community measure seeks to establish, we must assume that humanitarian cases fall as yet outside its scope, and hence outside the scope of Community law (see number [678]).

In summary, general principles of Community law apply to Member State acts that serve to implement or apply Community law. Whether or not the rule of Community law leaves discretion is not relevant for the applicability, but the degree of harmonisation that the Community rule is intended to establish, is.

Review of restrictions on the “common market freedoms”

[116] The second category of Member States’ measures that fall within the scope of Community human rights review concerns restrictions on the freedom of movement of capital, goods, services and persons in the European Union, the so-called “common market freedoms”. Member State rules that restrict or obstruct these freedoms are allowed for only when they are justified by the Treaty on European Community. For example, the freedom of movement of workers entails that workers have the right to travel from one Member State to another and stay there for the purposes of seeking employment, but this right may be subjected “to limitations justified on grounds of public policy, public security or public health”.¹⁰⁸ In the *ERT* case and subsequent case-law, the Court of Justice ruled that restrictions to common market freedoms must also be “compatible with the fundamental rights the observance of which the Court ensures”.¹⁰⁹ Thus, a domestic measure that is not based on a provision of Community law, and hence is not an implementation act, is nevertheless subject to review of compliance with general principles if it constitutes a restriction to a common market freedom.

ERT and subsequent case-law on the matter have inspired diverging interpretations. The most radical view was presented by Coppell and O’Neill, who inferred from *ERT* that the Court of Justice no longer observes “any distinction between Community acts and Member State acts, in relation to fundamental rights protection”.¹¹⁰ Thus, the mere fact that a Member State measure is at variance with Community human rights would already suffice to bring it into conflict with Community law and, as far as that conflict is concerned, within the scope of the Court’s jurisdiction.

Other authors have pointed out that the present case law of the Court offers little if any ground for such a broad application of Community principles.¹¹¹ It follows from this case-law that the national measure can be tested against Community principles only if a “connection [...] sufficient to justify application of Community principles” can be established.¹¹² The case of Kremzow provides for an example. Kremzow was an Austrian judge who had murdered a lawyer. He held that the criminal proceedings against him in Austria were not in accordance with Articles 5 and 6 ECHR. He stated that the Court of Justice had jurisdiction on the matter, as his detention affected his right to freedom of

movement ex Article 18 TEC. The Court of Justice however held that “a purely hypothetical prospect of exercising” the right to freedom of movement did not establish the required connection with Community law, and his case therefore fell outside the scope of Community law.¹¹³

Thus, a solid connection with the market freedoms is required to bring a national measure within the scope of application of Community principles.

[117] Could such a solid connection be established in asylum cases? For asylum, the relevant common market freedoms would be the freedom of movement for persons. But the personal scope of this freedom is restricted to Member State citizens (and third country nationals affiliated to them).¹¹⁴ I can not think of circumstances in which infringements on a third country national’s rights under international asylum law might impede an EU citizen’s fundamental freedoms. Therefore, it is unlikely that the Court’s jurisdiction over the compatibility of restrictions on common market freedoms with fundamental rights will have major consequences for review of domestic acts in the realm of asylum.

Conclusions

[118] It follows from Article 46(d) TEU and relevant case-law that all acts by Community organs must be compatible with general principles of Community law. Regulations, directives, decisions and other acts by Community institutions concerning asylum matters are subject to judicial review as to their compliance with international asylum law. Further, Member State acts are also subject to review of compliance with the general principles when they fall “within the scope” of Community law. National legislation that implements directives, legislation that falls within the scope of regulations or directives, and enforcement of Community law provisions all fall within the scope of Community law. The degree of discretion that the relevant piece of Community legislation leaves the Member States does not affect the applicability of Community principles on human rights. But if Community legislation explicitly limits its ambitions to initial harmonisation, review of domestic legislation is limited to areas explicitly addressed by the Community legislation.

It is most unlikely that national measures on asylum for third country nationals can be construed as restrictions on common market freedoms. Consequently, it is unlikely that the Court is competent to review the compliance of national measures with principles of Community law on this basis.¹¹⁵

2.2.2.4 The intensity of the test

[119] In the previous paragraphs (2.2.2.2 and 2.2.2.3), we saw that all provisions of international law that concern asylum can be ‘sources’ for the Community principles, and that those principles must be applied to both Community measures on asylum as well as to Member State acts implementing such measures. In the present paragraph, I will discuss to what extent protection by Community principles covers protection offered up to the standards of international law .

The extent to which acts within the scope of Community law must comply with international human rights law is somewhat uncertain, due to the wording employed in the Court’s case-law. This wording is a cause for uncertainty in two respects. First, the Court does not apply international law, but rather “principles” based on it. Secondly, according to *Wachauf* and later case-law, the Court applies these principles “*as far as possible*”. I will first discuss the various conclusions that may be drawn from these phrasings, and then take a look at the way in which the Court of Justice in practice treats international treaty law, with special attention for the role assigned to the case law of the European Court of Human Rights.

The phrasing of the test

[120] Article 6(2) TEU demands the Community to “respect fundamental rights, as guaranteed by the” European Convention of Human Rights. The Court’s standard phrase is more ambiguous:

“[...] fundamental rights form an integral part of the general principles of law observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect.”¹¹⁶

It might be inferred from this wording that human rights protection as offered by the Court necessarily falls short of human rights protection under the mentioned international treaties. The Court does not *apply*, but “draws inspiration from” the “guidelines” those conventions supply; the European Convention of Human Rights merely has “special significance” in that respect.¹¹⁷ Moreover, according to several authors the transformation of international human rights law to “principles” entails dilution of the protection those rights offer.¹¹⁸ An analogy may be drawn to the distinction between principles and custom (or

treaty law): though binding, international principles are not as clear-cut as custom. For example Besselink contends that no matter how strictly the Court of Justice may base its findings on actual formulations of human rights in for example the European Convention,

“[t]here remains a qualitative difference between, on the one hand, a general principle *which must inherently suffer exceptions* and, on the other hand, well-defined fundamental rights which may be restricted only under specified circumstances. [...] With general principles of law [...], even if its has been established that a certain case falls within the scope of the relevant principle, a court has to determine the weight of the principle should be in the light of the other competing principles [..., emphasis added, HB]”.¹¹⁹

According to this view, “general principles” by their very nature allow for balancing human rights with competing principles (the common market freedoms, for example) in cases where the underlying provisions of international law do not.

[121] It is however questionable whether such a conclusion can be based exclusively on the mere phrasing by the Court. In the case of *Steffensen*, the Court stated that

“[...] according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see, inter alia, [*Wachauf, Connolly v Commission and Roquette Frères*]). According to the Court’s case-law, where national legislation falls within the field of application of Community law, the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the *compatibility of that legislation with the fundamental rights - as laid down, in particular, in the European Convention for the Protection of Human Rights and Fundamental Freedoms - whose observance the Court ensures* [emphasis added, HB].”¹²⁰

And in *Akrich*, it observed that respect for family life as laid down in Article 8 ECHR

“is among the *fundamental rights which*, according to the Court’s settled case-law, restated by the preamble to the European Single Act and by Article 6(2) EU, *are protected in the Community legal order* [emphasis added, HB].”¹²¹

So, acts within the Community legal order must be “compatible” with rights laid down in the European Convention of Human Rights; these are “protected” within the Community legal order. The references to “settled case-law” in both

Akrich as well as *Steffensen* show that these cases do not entail a deviation from the jurisprudential line indicated above.¹²² Rather, these cases show that a shorthand rendering of the Court's case-law indicates a relationship between Community principles and international human rights law, which is not that loose at all. At any rate, it suggests that the laborious definition of the effect of the European Convention of Human Rights within the Community legal order does not or not necessarily imply that those rights can be balanced against competing principles.

[122] In *Wachauf*, the Court stated that Member States implementing Community rules must "*as far as possible*" apply those rules in accordance with the requirements of the protection of fundamental rights.¹²³ According to Coppel and O'Neill, this shows that fundamental rights serve "only as a principle of interpretation, and only to the extent that this is compatible with the wording of the Community legislation."¹²⁴ Other commentators however argued that this does not necessarily follow from the Court's reasoning in *Wachauf*. Duijkersloot suggests that the words "as far as possible" refer instead to the scope of discretion Member States have.¹²⁵ Weiler and Lockhart point out that fundamental rights do indeed function as principles of interpretation, but that this does not exclude that they function as principles of validation of the relevant rule of Community law. In other words, the quoted phrase does not obstruct invalidation of the measure involved by the Court if it found that there is no way to interpret that measure without violating human rights.¹²⁶

The wording of the Court of Justice, therefore, does not allow for definite conclusions as to the extent to which fundamental rights laid down in international conventions have to be observed. To assess the level of protection offered by Community principles, we therefore have to examine the application of international law provisions in the Court's case law. As far as international human rights law is concerned, only the European Convention of Human Rights offers sufficient material from which to draw conclusions.

The actual test

[123] Viering conducted an investigation of this issue in 1998 on the basis of about 40 judgements issued by the Court of Justice on appeals to provisions of the European Convention of Human Rights. He found that when it applied Community principles, the Court of Justice drew inspiration from those provisions, but at least occasionally made use of criteria that diverge from those laid down in the European Convention of Human Rights. But this does not necessarily mean that the level of protection is lower. Viering found that where

comparison of judgements issued by the Court of Justice with judgements from the European Court of Human Rights is possible, the outcomes do not differ markedly.¹²⁷

In its more recent case-law, it seems that the Court quite scrupulously tests against Community principles, in full accordance with the criteria laid down in the provisions of the European Convention as well as the relevant Strasbourg case-law. More restrictive readings of European Convention provisions by the Court of Justice seem to be unintentional.¹²⁸ Well-known is the case of *Hoechst*, where the Court of Justice had to decide whether or not the protection of the home ex Article 8 ECHR applies to undertakings, and concluded that it did not.¹²⁹ Three years later, however, the European Court of Human Rights came to the opposite conclusion in its judgement *Niemietz*.¹³⁰ The Court of Justice had to address the same issue again nine years later in *Roquette Frères*. It considered that

“For the purposes of determining the scope of that [general principle of Community law] in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises [...] and, second, the right of interference established by Article 8(2) of the ECHR ‘might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case’ (*Niemietz v. Germany* [...] § 31).¹³¹

Thus, “regard must be had to the case-law of the European Court of Human Rights”. It follows from *Roquette Frères* that the Strasbourg case-law may be relied upon, regardless of previous deviating rulings by the Court of Justice. Indeed, in much of its recent case-law on human rights, the Court of Justice explicitly and extensively refers to the case-law of the European Court of Human Rights.¹³²

As to the other bodies connected with instruments of international asylum law, the Court of Justice involved in its reasoning, as far as I know, only views of the Human Rights Committee. The Court did so in the case of *Grant v. South-west Trains*, wherein Grant relied on the meaning of a Covenant provision as interpreted by the Human Rights Committee. The Court dismissed the reading; it noted that the Committee’s views have no binding force and that the Committee had not stated any reasons for its reading.¹³³ As we saw in Chapter 1.4.2.2, the Committee’s views indeed lack binding force, and therefore derive their relevance from the quality of their reasoning.¹³⁴ The Court of Justice’s

assessment of their relevance is hence well in line with relevant international law.

Application of the European Convention of Human Rights by the Court of Justice?

[124] In summary, the Court of Justice does not balance human rights with competing principles such as the market freedoms, and it does not (willingly) depart from readings of the Convention rights by the European Court of Human Rights to the detriment of individuals. Can we conclude that testing against fundamental principles of Community law, inspired by the European Convention of Human Rights, in fact entails application of Convention provisions? Vermeulen observes that many ECHR provisions are inapt for direct application within the Community legal order as they do not set homogeneous standards.¹³⁵ Thus, many provisions such as Article 8 ECHR, allow the states a certain ‘margin of appreciation’ for the assessment of the necessity of restrictions. As a consequence, the same type of rule may be appreciated differently in several states. One state may accept it if it is in accordance with the minimum level of protection prescribed in Strasbourg case-law, whereas another state may reject it as incompatible with the European Convention on the basis of an optimising interpretation. This differential approach is however hard to reconcile with the tenet of uniform application of Community law. The Court of Justice avoided such problems by testing against ‘general principles of Community law’ instead of applying ECHR provisions.¹³⁶

Hence, we cannot equate the testing to against general principles that are inspired by ECHR provisions with application of those provisions. This observation does not detract from the findings above. In particular, it does not imply that the Court of Justice would allow a broader margin of appreciation for the Member States under a general principle than the relevant provision of the European Convention of Human Rights would.

Conclusion

[125] What, then, is the material scope of the general principles of Community law that are based on the Member States’ obligations under international human rights law? The Court persistently emphasises that the Community is not bound by the European Convention of Human Rights and other relevant treaties: it does not apply their provisions, but rather “draws inspiration” from them when formulating “principle”, not rules of Community law concerning human rights. Moreover, these principles have to be complied with only “as far as possible”. But paraphrases of this test by the Court of Justice itself on

the other hand suggest that there is little if any difference between application of principles of Community law and application of the corresponding international law norms.

Where it comes to the Court of Justice's practice, it appears that in the past both method and criteria that the Court applied at least occasionally diverged from the wording of Convention provisions, and from the application by the European Court of Human Rights. In recent case law however the Court of Justice seems to follow the Strasbourg case-law. As far as is relevant for asylum, application of general principles of Community law in practice leads to results equivalent to application of the concerned human rights law provisions.¹³⁷

2.2.2.5 Conclusions

[126] The well established practice of the Court of testing acts within the sphere of Community law to human rights through general principles of Community law finds an explicit basis in the Articles 6(2) and 46 TEU. The scope of adjudication is broader than these provisions suggest. It follows from the Court's case law that "respect" is required not only for the European Convention of Human Rights, but for the Covenant on Civil and Political Rights too. The Court's criteria suggest that the Convention Against Torture and the Refugee Convention can serve as sources of inspiration for general principles of Community law as well. All international asylum law can therefore serve as basis for those principles.

All acts by Community institutions must comply with general principles of Community law, as Article 46(d) TEU requires. Further, Member State acts within the scope of Community law are subject to such review. In the realm of asylum law, it concerns Member State acts that implement or apply Community legislation on asylum. Whether or not an act by a Member State implements or applies Community legislation (and hence falls within the scope of review of compatibility with general principles) depends on the scope of the relevant Community legislation. The circumstance that a rule of Community law leaves the Member States (some) discretion in a certain respect does not remove that aspect from the scope of review of compatibility with the general principles of Community law. It follows from *Maurin* that explicit limitation of harmonisation ambitions leads to a correspondingly restricted scope of review.

Finally, it appeared that the test against standards that general principles on human rights set amounts to application of the treaty provisions that

“inspired” them. In particular, the case-law of the European Court of Human Rights serves to define scope and content of the Community principles.

2.2.3 Article 63 TEC

[127] International law on asylum may have effect within the Community legal order by virtue of the direct references to it in Article 63 TEC. Measures on asylum that are adopted on the basis of Article 63(1) TEC must, according to the first clause of the provision, be “in accordance with the [Refugee Convention] and other relevant treaties”. According to the second last clause of Article 63,

“Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.”

These explicit requirements of “accordance” and “compatibility” with international asylum law have no precedents in either the Treaty on European Community or the Treaty on European Union.¹³⁸ The Court of Justice has not yet ruled on it. Scope and meaning of the clause therefore have to be assessed on the basis of the context as well as by analogy with the established case law on human rights.

I will subsequently address which instruments of international asylum law are relevant, the scope of application of these provisions and the intensity of review that they require, all as compared to the general principles of Community law.

Relevant treaties and agreements

[128] Article 63(1) TEC, first clause demands compliance with an open group of treaties: apart from the Refugee Convention, all “other relevant treaties”. These treaties should be relevant for “asylum”, more specifically the subject matter listed in 63(1)(a) till (d) TEC. All instruments of international asylum law that were mentioned in paragraph 1.4 may be “relevant” for legislation pursuant to Article 63(1) TEC.¹³⁹

Hailbronner points out that treaties to which not all Member States are party are not included, as it would be most unlikely that Member States wanted to bind the Community to obligations they did not take upon themselves under international law.¹⁴⁰ Does this bar application of (otherwise relevant) international law on asylum?

All Member States ratified the instruments of international law relevant for asylum, but Belgium and Ireland ratified the Convention Against Torture only after the entry into force of the Treaty of Amsterdam (cf. number [89] above). As the purpose of the requirement of accordance with “relevant treaties” is the prevention of conflicting obligations, treaties that entered into force for all Member States after the Treaty of Amsterdam should also be regarded as “relevant” for the purpose of Article 63(1). We may further observe that not only treaties to which the Member States are signatories, but also “treaties on which the Member States have collaborated” serve as sources of inspiration for general principles of Community law (see number [110]).

Arguably, the requirement of “compatibility” with international agreements likewise concerns agreements that are “relevant” for the subject matter mentioned under 63(3) and (4) TEC. The requirement is relevant for rules on safe third countries and secondary rights of refugees, including claims to family reunification, as these are all based on Article 63(3)(a) (cf. number [201]). The prohibitions of *refoulement* and the Refugee Convention are relevant treaty law for rules on the safe third country, Article 8 ECHR for family reunification and procedural standards if they are implied by measures on these issues.

Scope of application

[129] Which acts fall within the scope of Article 63(1) TEC? It follows from the text that all measures adopted by Community institutions on the basis of Article 63(1) TEC must be in accordance with international asylum law. Does this wording exclude application to Member States’ actions?¹⁴¹ Here, the scope of application of Community fundamental rights must be taken into account. We have seen that the Court has held since *Wachauf*, that Member State acts that implement or apply Community law fall within the scope of Community law, and must therefore comply with general principles of Community law. It should be noted that the ground for the application of Community principles to Member State acts is the circumstance that these acts implement or apply Community law.¹⁴² The Court has continued to do so although Article 46(d) TEU explicitly speaks of testing “action of the institutions” of the Community to Article 6(2) TEU. The reason for this extension of the scope of application of general principles of Community is the unity in application of Community law (cf. number [113]).

Arguably, the same reasoning applies to the requirement of “accordance” with the Refugee Convention and other relevant treaties. Thus, measures adopted by Member States to apply regulations or directives as well as

enforcement action by Member States fall within the scope of review under Article 63(1) TEC.

[130] Article 63 second last clause TEC defines the scope of acts that must be “compatible” with international treaty law differently:

“Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements”.

It follows from the text that “national provisions” must be compatible with international law, and it would appear that the Court of Justice is competent to review this compatibility. The text of the provision does not explicitly address compatibility of acts by Community institutions with international law.

Hailbronner argues that the Court of Justice can review neither acts by Community organs nor Member State acts as to their compatibility with international agreements as meant in Article 63 final clause. As to review of Member State acts, he states that it is unlikely that the Member States intended to establish jurisdiction for the Court of Justice competing with that of the bodies monitoring those agreements, or to establish such competence as to agreements that do not provide for judicial review themselves.¹⁴³ However, Article 6(2) *jo* 46(d) TEU very explicitly reaffirms the Court’s case-law on human rights that competes with the supervision by the European Court of Human Rights. And Article 63(1) TEC obviously renders the Court of Justice competent to review compliance with the Refugee Convention and other treaties that do not provide for similar judicial review. Moreover, we should observe that the clause requires compatibility “with this Treaty and with international agreements”. Obviously, compatibility of Member State legislation with the Treaty on European Community is under review by the Court. Exclusion of such review as to international agreements cannot be reconciled with the text of the clause. Finally, if the compatibility of neither Community action nor Member State acts with international agreements can be reviewed, the question is what meaning the reference could have. In summary, we may assume that the Court of Justice is competent to review the compatibility of “national provisions” as meant in Article 63 second last clause TEC with “international agreements”.

[131] As to review of Community acts, Hailbronner states that “taking into account the language of Article 63(1) ECT and Article 6(2) TEU whereby the Community is bound to respect the standards contained in international agreements it must be concluded a contrario that delibe-

rately Member States have not included a similar clause into the second paragraph of Article 63 ECT. Accordingly, the Community is not bound by the agreements in question.”¹⁴⁴

Thus, whereas the text of Article 63 second last clause TEC does not require that Community institutions are bound by international agreements, it follows from an *a contrario* reading of the context that this omission was intentional and serves to preclude that Community institutions are bound by that international law.

But arguably, this *a contrario* reasoning is not conclusive. Article 6 TEU does not address Community (or Union) institutions in particular, but “the Union” in general, which may encompass next to Community institutions the Member States as executive agents of the Union. It is true that Article 46(d) TEU restricts review of compliance with Article 6 TEU to acts by Community institutions, but we saw that in fact the review of compliance with Article 6 TEU by the Court of Justice encompasses Member State acts as well. Thus, the context shows that the absence of an explicit reference to acts by Community institutions is not conclusive: this review might be implied. And there are grounds to assume that it is indeed implied by Article 63 second last clause TEC.

One of the objectives of Community action pursuant to Article 63 TEC is “safeguarding the rights of third country nationals” (see number [175]). Rules of Community legislation based on Article 63(3) TEC serve this objective (cf. number [254]). Arguably, the review of compatibility with international agreements does so as well. If so, review of acts by Community institutions is necessarily implied. We should observe that Member States are bound to comply with general principles of Community law because these principles apply to Community rules [cf. number 113]. The Court of Justice’s competence to review compatibility of “national provisions” with international law would lack any justification if it could not exercise the same review of the Community acts from which those national provisions deviate. Besides, the Court could hardly review compliance of Member State acts with international law if it could not review Community acts. If a directive based on Article 63(3) TEC imposes an obligation that “prevents” the Member States acting under their international agreements, those Member States could maintain legislation at variance with that directive pursuant to Article 63 second last clause. The Court of Justice, called upon to assess the conformity of the national provisions in question with Community law, would have to assess whether the directive does indeed prevent the Member State acting under the “agreements”. In fact, it would have to assess whether or not the directive imposes obligations that are incompatible with the agreements, that is, assess

the “compatibility” of the directive with international law. Hence, these agreements necessarily function as a standard of review for Community measures based upon Article 63(3) and (4) TEC.

Thus, it follows from object and purpose that Article 63 second last clause TEC requires that Community institutions observe “international agreements”. The absence of a more explicit requirement of respect is not conclusive – after all, before the Treaty of Amsterdam all testing of measures to fundamental rights took place without an explicit Treaty basis (and the testing of Member States’ acts to general principles of Community law still lacks this explicit basis).

In summary, the scope of the requirement of respect for international asylum law in both point (1) and in the second last clause of Article 63 TEC must be construed in the same way as the scope of application of general principles. Both provisions apply to acts of Community institutions as well as to implementation acts of Member States.

Accordance and compatibility

[132] Article 63(1) TEC requires that measures should be “in accordance with” with relevant treaty law. By virtue of this reference in primary Community law, international asylum law is a source of law within the community legal order.¹⁴⁵ In this respect, the testing against international asylum law under Article 63(1) differs from a testing against general principles of Community law referring to the same rules of international asylum law. The Refugee Convention and other relevant treaties can serve as a “source of legal knowledge” for identifying general principles of Community law; then, international law serves as an indirect standard of decision. But pursuant to Article 63(1), they serve as a direct standard of decision.¹⁴⁶ The wording of Article 63(1) TEC thus serves to put beyond doubt that there is no space for alternative criteria or assessment of scope of international law under Article 63(1) TEC, for which the text of Article 6 TEU seems to allow.

[133] As to the interpretation of the relevant rules of international law, Hailbronner observes:

“the Court of Justice will be autonomous when interpreting the Geneva Convention. At the same time, Member States’ practice under the Convention will inform the interpretation of Article 63(1) ECT. When ascertaining the meaning of Geneva Convention provisions the Court of Justice should apply a technique similar to the elaboration of general

principles of Community law. In that course the Court will have to consider that the Geneva Convention has left state actors a large margin of appreciation. In particular, the Court may not prefer restrictive interpretations as developed by the judiciary in some Member States over interpretations dominant in other Member States which have retained more political, and administrative discretion under the relevant domestic jurisprudence.”¹⁴⁷

In other words, as the Refugee Convention allows a large margin of appreciation to the states party to it, the Court of Justice should do so too when assessing the accordancy of acts by Member States or Community institutions with the Refugee Convention. It should therefore not impose a “restrictive” interpretation, that is, subject such acts to full judicial scrutiny.

Indeed, where the Refugee Convention does leave a margin of appreciation to the Contracting states, these states act “in accordance” with it when they comply with the standards set by the instrument, even though other states may apply an optimising interpretation (cf. number [124] above). But the Contracting states enjoy a margin of appreciation only if and in so far as it follows from the Refugee Convention. And the question whether or not the Convention does so cannot be answered by mere reference to the practice of some Member States. Rather, it is a matter of treaty interpretation, governed by relevant rules of international law. As Steyn LJ put it in *Adan and Aitsegur*: “the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [VTC] and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. [...] In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning”.¹⁴⁸

The Court of Justice has on numerous occasions acknowledged that international treaties to which the Community is bound are to be interpreted and applied according to the rules laid down in the Vienna Convention on the Law of Treaties.¹⁴⁹ When it interprets the Refugee Convention pursuant to Article 63(1) TEC, it therefore will assign state practice the role that Article 31(3)(b) VTC assigns to it. It follows that Member States can not rely on their state practice, no matter how long standing, if it is at variance with the true meaning of a Convention provision established according to the relevant rules of the Vienna Treaty Convention.

[134] Arguably, the Refugee Convention does indeed leave a margin of appreciation to the Contracting states in certain respects. For example, it bestows many benefits to “lawfully present” or “lawfully staying” refugees, that is, to refugees whose presence or stay is in accordance with domestic law (see par. 8.2.2). The Refugee Convention does not in general state when or on what conditions the states should deem the refugee’s presence or stay as “lawful” for the purposes of those benefits; arguably, the Contracting states enjoy a certain margin of appreciation in this respect. This margin of appreciation is granted because the Refugee Convention endeavours to balance the burden of protection for the states to the needs of refugees.

But in many other respects, the Refugee Convention does not leave such a margin. In particular, the text of Article 1 RC in no way suggests a margin of appreciation. Further, object and purpose of the Convention do not justify the assumption that the refugee definition leaves a margin. In general, the instrument serves to secure protection for refugees and to prevent the problem of refugees “from becoming a cause of tension between States”.¹⁵⁰ Assuming that persons qualify for refugee status in one state but not in another would run counter to both objectives: certain categories of aliens would be denied protection by the first state, and this in turn might lead to a heavier burden upon the other one.

Whether or not a person qualifies for refugee status under the Refugee Convention is therefore subject to full judicial scrutiny. The Court of Justice should assess the “accordance” of acts by Community institutions and Member State with the Refugee Convention accordingly.

[135] Like Article 63(1), the second last clause of Article 63 TEC sets international agreements as a direct standard of decision. The application of the term “compatible” raises the question of whether a distinction from “accordance” as required in Article 63(1) was intended. The term “compatible” seems to require a lesser degree of compliance than “accordance” in 63(1) does.¹⁵¹ But it is difficult to imagine what exactly this variation would entail – one complies with an obligation, or one does not, a middle way is not easily imaginable. It is unlikely that this terminological subtlety has practical consequences. It should be remembered that the much vaguer term “respect” in Article 6(2) TEU in fact amounts to requiring full compliance.

Concluding remarks

[136] Comparison of the findings on Article 63(1), Article 63 second last clause TEC and Article 6(2) TEU gives the following results. Both references

in Article 63 address only treaty law that binds all Member States. General principles of Community law in contrast may also be based on treaties that do not bind all Member State. As to the scope of application, all three apply to acts by Community institutions as well as to Member States' implementation acts.

The most important difference concerns the way in which the several provisions give working to international asylum law. By requiring "accordance" and "compatibility", Article 63 sets international asylum law as a direct standard. Under Article 6(2) TEU, international law works only indirectly, through general principles of Community law. The latter construction seems to allow for some discretion. But as we saw above, compliance with general principles entails in fact accordance with rules of international law.

[137] Strikingly, "accordance" or "compatibility" of measures pursuant to Article 63(2) TEC is not explicitly required. In order to properly assess the reason for absence of such a reference in Article 63(2), we should bear in mind that the general principles of Community law apply. Thus, accordance with relevant international asylum law is required, but only in a less explicit way. What could have been the reason that the Masters of the Treaty considered a more explicit requirement unnecessary for Article 63(2) TEC?

It is unlikely that they considered international law irrelevant for measures pursuant to this provision.¹⁵² Temporary protection beneficiaries may be unrecognised refugees to whom most Refugee Convention provisions apply - among them, the prohibition of *refoulement* ex Article 33 RC (see paragraph 8.8.1). The Masters of the Treaty were well aware of this, as they applied the term "refugees" in Article 63(2) TEC; likewise, the term "international protection" renders it unlikely that the relevance of "other relevant treaties" for subsidiary protection was not realised.

Arguably, the reason should rather be sought in the scope of legislation that the Masters of the Treaty expected. Article 63(1) TEC requires adoption within five years of measures on quite detailed subject matter. Hence, a relatively detailed legislation on matters concerning international asylum law was expected. In order to make clear that any possible conflict with international law should be avoided, "accordance" with relevant rules was prescribed. The same holds true for specific issues mentioned under points 3 and 4 of Article 63, especially family reunification and repatriation of illegally present third country nationals. Article 63(2) on the other hand requires "measures" on temporary and subsidiary protection, and on burden sharing. This non-specific description of subject matter warranted the expectation of only a modest scope

of legislation and a modest degree of harmonisation. The chance of conflicts with international law was therefore estimated as low, and accordance with international law was not required in a more explicit way.

2.2.4 References in secondary Community law

[138] Several instruments of secondary law refer to instruments of international asylum law as a standard of decision. For example, Article 3(3) Dublin Regulation states that “the right [...] to send an asylum seeker to a third country” should be used “in compliance with the provisions of the” Refugee Convention.¹⁵³ These references make international law a direct standard of review, in much the same way as Article 63(1) TEC does. As the relevant provisions of secondary law are subject to the requirement of “accordance” in Article 63(1) TEC, these references in secondary law are primarily of interest for the delimitation of the scope of judicial review of this accordance (see Chapter 9.3).

2.2.5 Concluding remarks

[139] The norms of international law on asylum may have effect within the Community legal order in various ways – as international customary law, as sources of inspiration for general principles of Community law, and by virtue of reference in primary or secondary Community law. The findings on these matters were summarised in concluding paragraphs (numbers [107], [126], [136] and [138]; see also par. 2.4). Here, another issue will be discussed.

The discussion of the working of international asylum law within the Community legal order in the preceding paragraphs is entirely based on positive law. Several authors have construed alternative models according to which the Community is bound to international law, and specifically to human rights law. According to Lawson, these models all fall in either of two categories.¹⁵⁴ First, the hierarchically superior status of human rights provisions. In paragraph 2.1.3 however, we saw that no rule of international asylum law is *jus cogens*.

The second category consists of succession or substitution models. According to the succession approach, the Community is successor to the human rights obligations of the Member States. According to the substitution approach, the obligation to observe human rights was transferred together

with the powers they concern, as no one can transfer more powers than he had before.¹⁵⁵ Both approaches therefore amount to the same thing.¹⁵⁶ These approaches seem the more convincing as the Court of Justice accepted the principle of substitution in *International Fruit* (see par. 2.2.1). Still, application of this reasoning at large is untenable on several grounds, so Lawson argues.¹⁵⁷

First, substitution and succession find no basis in international treaty law. As we saw in Chapter 2.1.1, Article 30 VTC is based on the premise that states can enter conflicting obligations when successively concluding treaties. Hence, restriction of state powers by the anterior treaty does in no way affect that state's capacity to enter conflicting obligations in a later treaty. Second, succession or substitution models are too static. They give no satisfactory solution for treaty obligations engaged in by the Member States after the transfer of power, such as the Covenant on Civil and Political Rights and the Protocols to the European Convention, concluded after the Treaty of Rome of 1957. The same holds true for treaty obligations that appeared only after the transfer of power to the Community, such as those that emanate from dynamic interpretation of the European Convention of Human Rights by the Strasbourg organs. This problem is even greater when it comes to the Member States that acceded later to the Community (all relevant instruments of international law date from before 1 May 2004). The powers they transferred when acceding were further limited by those later human rights obligations, but at the same time, they could accept the complete *acquis communautaire*.

When it comes to asylum, we may observe that Article 63 TEC explicitly states that European asylum law should be in accordance with relevant treaty law. It follows that the Masters of the Treaty did not assume that the obligations under those treaties were transferred as inherent limitations to the powers mentioned in Article 63(1), (3) and (4) TEC.

[140] Finally, case law of neither the Court of Justice nor the European Court of Human Rights gives support for succession or substitution theories. The latter reviews Member States' acts within the scope of Community law as their own acts, and holds the states fully responsible for them (cf. paragraph 2.1.3). This approach is not compatible with the succession model.¹⁵⁸ As to the Court of Justice, in *International Fruit* it indeed accepted the principle of substitution, but at the same time limited its application to areas where the transfer of powers is complete. As Lawson argues, it is unlikely that substitution effects occur in areas where this transfer is incomplete

(such as asylum law), as Article 307 TEC addresses that situation.¹⁵⁹ And the Court of Justice made it quite clear in *Burgoa* that the Community is in no way bound to the anterior treaty obligations of the Member States under Article 307:

“Although the first paragraph of Article 234 [now Article 307, HB] makes mention only of the obligations of the Member States, it would not achieve its purpose if it did not imply a duty of the part of the institutions of the Community not to impede the performance of the obligations on the Member States which stem from a prior agreement. However, that duty of the Community institutions is *directed only* to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question. [emphasis added, HB]”.¹⁶⁰

Nor can the general principles of Community law concerning human rights be based on succession or substitution theories. For the very concept is based on the premise that constitutional traditions and human rights treaty provisions in international law binding the Member States do not affect Community powers on their own force. It is the general principles of Community law inspired by them, which work within the Community legal order. We saw above (in paragraph 2.2.2) that whereas the testing of Community acts against provisions of the European Convention in many respects seems equivalent to application of the latter, the Court of Justice persistently calls it application of general principles of Community law inspired by those provisions. It may very well be that this somewhat laborious description of the Community law basis of the test is inspired by the wish to avoid the impression that Convention provisions apply through succession.

[141] If succession is not the basis for Community principles on human rights, the question remains what their basis is. We saw that the Court of Justice never addressed the issue. Since the Treaty of Amsterdam, Article 6(2) TEU provides for a basis. But according to the Community judiciary, this provision merely “reaffirms” its case law on general principles (cf. number 109]). Moreover, these principles have a broader scope of sources and application and require more intense testing than Article 6(2) and 46(d) TEU suggest (cf. numbers [110] and [113]). As testing against human rights norms can neither be based on the hierarchically superior position of those norms nor on succession or substitution models, unilateral recognition of obligatory effect by the Community as expressed in Article 6(2) TEU is the most viable alternative.¹⁶¹

2.3 The Charter on Fundamental Rights

2.3.1 Introduction

[142] At the Nice European Council in 2000, the “Charter of Fundamental Rights of the European Union” (henceforth: the Charter) was proclaimed.¹⁶² The whole Charter, including its Preamble has, with some amendments, been inserted into the Constitution as its Part II.

The Charter and Part II CfE both consist of two parts. First, material provisions stating rights and obligations. Second, “General provisions governing the interpretation and application” of these provisions (Articles 51-54 Charter, and 111-114 CfE). Guidance on interpretation and application is further provided for by “explanations” relating to the Charter provisions that were drafted on instigation of the Presidium of the Convention that drafted the Charter. The Presidium stated that these explanations “have no legal value and are simply intended to clarify the provisions of the Charter”,¹⁶³ but according to Article 112(7) CfE

“The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.”¹⁶⁴

Because of this explicit reference, these “explanations” serve as means of interpretation of the Charter provisions as laid down in the Constitution (cf. Article 31(2)(b) VTC, see numbers [73] and [76] above).

The text of and explanations to the provisions relevant for asylum law in the Charter do not differ significantly from their successors in the Constitution. Therefore, I will discuss both instruments together. First, I discuss the “general provisions” that address the relation between Charter or Part II CfE provisions and international law (paragraph 2.3.2) and those that address their scope of application (paragraph 2.3.3). Then, I address the substantive scope of some provisions of particular relevance for asylum law: the “right to human dignity”, “the right to asylum”, and the provisions that address protection from *refoulement* (in paragraphs 2.3.4 to 2.3.6). The important “right to an effective remedy and a fair trial” (Article 47 Charter, 107 CfE) is discussed in the context of appeal procedures, in Chapter 6.3.1. The legal effect of the Charter is addressed in paragraph 2.3.7.

2.3.2 General provisions on Charter provisions and international law

[143] The codification of human rights in the Charter is markedly different

from, *inter alia*, the European Convention of Human Rights and the Covenant of Civil and Political Rights in that conditions for limitation are not defined for each right separately, but laid down in a general limitation clause that may apply to all rights laid down in the Charter.¹⁶⁵ It allows for limitations not provided for in the European Convention on Human Rights or other instruments of international asylum law. But pursuant to Article 52(4) Charter (Article 112(3) CfE),

“Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”.

According to the Explanation,

“The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.”¹⁶⁶

Hence, Charter provisions that “correspond” with provisions of the European Convention should be interpreted and applied in accordance with them, as “determined” in the case law by both the European Court of Human Rights and the Court of Justice.¹⁶⁷ Moreover, in Article 112 CfE a new paragraph (112(4)) was inserted, that states:

“Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”.

Together, these provisions state the same standards for interpretation of Charter rights as Article 6(2) TEU does for general principles of Community law as applied by the Court of Justice.

[144] Are the other instruments of international asylum law than the European Convention of Human Rights also relevant for the interpretation and application of Charter provisions? According to the Preamble (fifth recital), the rights laid down in the Charter and Part II CfE “result” from (*inter alia*) “international obligations common to the Member States”. This is in line with the case-law of the Court of Justice on general principles of Community law (see

number [110]). The purpose of the Charter to enhance rather than restrict human rights protection in the Community (or the Union), further indicates a reading of its provisions in accordance with those other instruments; the explanation to Article 19(1) Charter (Article 79(1) CfE) confirms it.¹⁶⁸

Finally, according to Article 53 Charter (Article 113 CfE):

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

Thus, Charter provisions cannot adversely affect the working of international asylum law within the Community or Union legal order. It follows that Charter provisions may not be interpreted as restricting the effect of the references to international asylum law in Articles 63 TEC (and its successor in the Constitution, Article 266 – see paragraph 3.8.3). Further, we should note that the provision explicitly acknowledges the relevance of “international agreements to which [...] all the Member States are party” for interpreting Charter provisions.

2.3.3 Scope of application

[145] Article 51(1) Charter (111 CfE) defines the “field of application” as follows:

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.”¹⁶⁹

Charter provisions thus apply to acts by Community or Union institutions, such as legislative acts, as well as to Member State acts when implementing Community (or Union) law.¹⁷⁰ According to Article 51(2),

“[t]his Charter does not establish any new power or task for the Community [or the Union], or modify powers and tasks defined by the Treaties”.

According to the Explanation, this provision draws “the logical consequences” of the subsidiarity principle and of the principle of conferral.¹⁷¹

Community or Union institutions and Member States when implementing Community (or Union) law must “respect” the “rights” laid down in the

Charter, “observe” the principles and “promote” their application. Under the Constitution, the distinction between “rights” and “principles” is relevant for judicial review :¹⁷² it appears that principles lack direct effect, in contrast to “rights”.¹⁷³ The provisions relevant for asylum are characterised either by the Charter text or in the Explanation as “rights”.

2.3.4 Human Dignity

[146] Article 1 of the Charter (Article 61 CfE) reads:

“Human dignity is inviolable. It must be respected and protected”.

Several pieces of European asylum legislation explicitly seek to ensure compliance with this provision (see number [254] below). The Explanation states that “[t]he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights”; therefore, it “is part of the substance of the rights laid down in this Charter” and must “be respected, even where a right is restricted”.¹⁷⁴ The substantive scope is hence inherently unclear. The provision however appears to be relevant for scope and content of secondary rights of persons in need of protection, as the Preambles to the Directives on Qualification and Reception Standards explicitly refer to it.¹⁷⁵

2.3.5 The right to asylum

[147] Articles 18 Charter and 78 CfE state that

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community [or with the Constitution, HB]”.

The provision consists of two elements. First, it determines the existence of “the right to asylum”. Secondly, it imposes the obligation to “guarantee” this right, “with due respect for the rules of the” Refugee Convention, and “in accordance with” the Treaty on European Community (or the Constitution). I will first determine the substantive and personal scope of the element “right to asylum”, and then address the scope of obligations defined by the second and element.

Substantive scope

[148] What does “the right to asylum” entail? Article 63 TEC, on which pro-

vision Article 18 Charter is “based” according to the Explanation,¹⁷⁶ as well as Article 266(1) Constitution oppose “asylum” to “temporary protection” and “subsidiary protection”; for the purposes of those provisions, “asylum” means durable international protection for refugees (numbers [183] and [234] below). This seems to be in line with the normal meaning of the term “asylum”: according to Grahl-Madsen it refers to a durable solution for persons in need of protection, as opposed to temporary refuge.¹⁷⁷

“The right to asylum” is distinct from protection from *refoulement*, as the latter issue is addressed separately by Article 19 Charter (Article 79 CfE). The (exclusive) reference to the Refugee Convention also implies so: the feature distinguishing this Convention from the other instruments of international law is the conferral of secondary rights. And according to well-established case-law of the European Court of Human Rights, the “right to political asylum” is not contained in the European Convention or its Protocols,¹⁷⁸ in contrast to protection from *refoulement* – which opposes “asylum” to “non-*refoulement*”.

The reference to the Refugee Convention in the Charter provision implies that “the right to asylum” encompasses a claim to secondary rights. But “asylum” and protection owed under the Refugee Convention cannot be equated. Asylum is protection granted by a state that may be conditioned by the Refugee Convention. The Preamble to the latter instrument implies the same distinction.¹⁷⁹

In the context of Union law, we should read Article 78 CfE in conjunction with Article 266(1) CfE that mentions the offer of an “appropriate status to persons in need of it” as one of the aims of Union law on protection. Thus, the “status” is a constituent of “protection”, and a material standard for these statuses is stated: “appropriateness”

Literal meaning and context hence suggest that the right to asylum is the right to a durable solution. It entails protection that should be “appropriate”, and includes a claim to secondary rights.

Personal scope

[149] By virtue of the reference to the Refugee Convention, the personal scope of Article 18 encompasses Convention refugees, but is not necessarily restricted to them. There are good reasons to assume that the term “asylum” in Article 18 addresses protection for non-refugees in need of protection as well.

Neither the technical meaning, nor the Refugee Convention implies the limitation of “asylum” to Convention refugees. Moreover, the Spanish Protocol renders this restriction unlikely. This Protocol, attached to both the Treaty on European Community and the Constitution, is relevant context of Article 18

Charter, as the latter provision is not restricted to third-country nationals.¹⁸⁰ The Sole Article of the Spanish Protocol addresses “asylum” applied for by EU nationals (see par 6.4.5). The Spanish Protocol does not refer to the Refugee Convention. Nor does it otherwise suggest that “asylum” concerns only Convention refugees. Such a restriction would arguably be contrary to object and purpose of the Protocol (cf. number [453]). And we may not assume that the close association between Refugee Convention protection and asylum in Articles 63 TEC and 266 CfE applies to “asylum” for Union citizens as well, as they are excluded from the scope of both treaty provisions (number [184] and [229]). Finally, the term “asylum” as applied in Article 266(2) CfE first clause (“the common European asylum system”) encompasses “subsidiary” and “temporary” next to refugee protection (see number [232] below).

In sum, the right to asylum applies to refugees, and may apply to others in need of protection as well.

The obligation to guarantee

[150] The recognition of the right to asylum as a claim to protection including secondary rights seems a bold step – in international law, this right has not been recognised (cf. number [11] above). However, the provision does not impose an obligation to “grant asylum”: according to the second element of Article 18 Charter (Article 78 CfE), the addressees of the provision are merely obligated to “guarantee” this right to asylum. Hence, we must distinguish between the refugee’s claim to asylum, which the Charter recognises, and the obligation to grant asylum, which the Charter does not impose. Reading the provision otherwise to the effect that, say, each refugee has a right to a status and can hence not be expelled to a safe third country (cf. Chapter 7) would run counter to Article 63(1)(a) TEC (and its successor 266(2)(g) CfE), that presupposes that the Member States can expel refugees.

The obligation to guarantee is conditioned by the obligation to pay “due respect” to the Refugee Convention and the obligation to act in accordance with the Treaty on European Community (or the Constitution). The requirement of respect for the Refugee Convention sets a material standard.¹⁸¹ Arguably, the requirement of “accordance with the Treaty on European Community (Constitution)” has the same meaning as Article 52 Charter (Article 112 CfE, see number [143] above). A similar clause does not occur in other Charter provisions (or provisions of Part II CfE) laying down rights. Maybe it was inserted in order to make clear that the “right to asylum” cannot be invoked against the Spanish Protocol that substantially conditions this right.¹⁸²

[151] What, then, does the “right to asylum” in fact entail? Arguably, it has at least two important implications. First, when expelling refugees (or other persons within the scope of Article 18 Charter or 78 CfE) to a third country (i.e. to a country other than the one where they fear being persecuted), the Member States must “guarantee” that those refugees have access to asylum, that is to a durable solution and appropriate secondary rights (see paragraph 7.5.6). Second, when the alien entitled to asylum is not expelled, the Member States must offer this durable solution themselves. This entails that those who are not refugees but are entitled to protection on other grounds (Article 3 ECHR for example) must be granted a status and appropriate secondary rights. For refugees, it means that the grant of a long-term residence permit (as opposed to asylum seeker status or temporary protection status) cannot indefinitely be postponed (see further Chapter 8.9).

Conclusion

[152] In summary, ordinary meaning as well as the context imply that “the right to asylum” has a remarkably broad meaning: it implies that those in need of international protection have a right to an appropriate status. But the obligation resting on Member States as regards this right is left somewhat vague – they must merely “guarantee” this right, not “grant asylum”. The Refugee Convention sets a material standard for this obligation. The implications of the obligation to guarantee the right to asylum differ depending on the situation. The implications for the protection statuses established by European law will be discussed under paragraph 8.9, those for the application of the safe third country exception in paragraph 7.5.6.

2.3.6 The prohibition of refoulement

[153] Article 19(2) Charter (Article 79(2) CfE) runs as follows:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

The Explanation states that Article 19(2) “incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 [ECHR]”; explicit mention is made of the judgements *Ahmed* and *Soering*.¹⁸³ According to the latter judgement, Article 3 ECHR prohibits “action (taken) by a Contracting state which has as a direct consequence the exposure of an individual to ill-treatment”.¹⁸⁴ A comparison of Article 19(2) with this case law reveals significant differences.

First, Article 19(2) states that “no one may be removed, expelled or extradited”. In a literal reading, this prohibition does not encompass other forms of “action” than removal, most notably, *refoulement* in the technical sense, i.e. return at the border.¹⁸⁵ Second, Article 19(2) refers to “the death penalty” next to the forms of ill-treatment mentioned in Article 3 ECHR. The provision therefore codifies the prohibition of *refoulement* implicit in Article 1 of the Sixth protocol to the European Convention as well (see number [16] above). Third, and most remarkable, Article 19(2) requires that the “risk” of subjection to ill-treatment is “serious”. According to the case law of the European Court of Human Rights, Article 3 ECHR prohibits removal if the risk of ill-treatment in the receiving state is “real”. Arguably, the qualification “serious” is at variance with Article 3 ECHR, as it requires a higher degree of foreseeability than the qualification “real” implies.

[154] Thus, whereas Article 19(2) aims to “incorporate” the relevant case-law of the European Court of Human Rights on exposure to ill-treatment,¹⁸⁶ its wording suggests a different scope. The scope of the Charter provision is wider, where it concerns the “treatment” risk, but considerably narrower as to the other elements of the prohibition. Should we assume that under the Charter (and the Constitution) the substantive scope of the prohibition on exposure to ill-treatment is hence narrower than under the European Convention of Human Rights? This is unlikely, for three reasons. First and foremost, Article 52(3) Charter requires that scope and meaning of the right to “protection in the event of removal, expulsion or extradition” is “the same” as the corresponding right under Article 3 ECHR, as identified by the European Court of Human rights (see number [143] above). Second, any person falling outside the scope of Article 19 Charter may invoke Article 4 Charter (Article 64 CFE):

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Scope and meaning of this provision are “the same” as those of Article 3 ECHR as interpreted by the European Court of Human Rights.¹⁸⁷ And there is no reason to assume that Article 19(2) is intended to exclude expulsion from the scope of Article 4 Charter. Other Charter provisions show similar overlap, obviously without implying such exclusion.¹⁸⁸

[155] Neither text nor explanations refer to other prohibitions of *refoulement* than Article 3 ECHR. Protection under Article 33 RC is provided for by Article 18 Charter (78 CFE). The wording of Article 7 CCPR is almost identi-

cal to Articles 3 Charter (and 62 CfE (the former makes mention of “cruel” treatment). As an “international obligation common to the Member States” referred to in the Preamble (see number [144]), Article 7 CCPR should be taken into account when reading or applying the mentioned Charter (Part II CfE) provision. Arguably, the same applies to Article 3 CAT, notwithstanding the difference in wording.

2.3.7 The legal effect of the Charter

[156] The legal effect of the Charter as Part II of the Constitution raises no questions: after the entry into force of the Constitution, all its provisions will rank as primary Union law. Although the Charter (in its present form) was drafted as if it had full legal effect (cf. Article 51 Charter, quoted under number [145]), its legal effect is as yet unclear. The European Parliament, the Council and the Commission “solemnly proclaimed” the Charter;¹⁸⁹ its legal status may be defined as an “inter-institutional agreement”¹⁹⁰ that binds them vis-à-vis each other.¹⁹¹ The Member States did not attribute the Charter legally binding force.¹⁹²

Nevertheless, the Charter may exert legal force under the Treaties of European Union and on European Community in two ways. Firstly, through Article 6(2) TEU, and thus on the same footing as “fundamental rights, as guaranteed by” the European Convention and “constitutions common to the Member States”; or secondly, by virtue of references in Community legislation.

The Charter as source for general principles of Community law

[157] Charter provisions may serve to identify or define general principles of Community law.¹⁹³ In fact, the Convention that drafted the Charter was mandated to codify existing general principles.¹⁹⁴ And the mere circumstance that the Member States did not entreat the Charter with binding force is in itself not an insurmountable obstacle: the Court of Justice identified general principles deriving from the “constitutional traditions common to the Member States”, even though the right in question had not been recognised in all Member States.¹⁹⁵

[158] The Court of First Instance has indeed referred to Article 47 Charter as a “reaffirmation” of a general principle of Community law.¹⁹⁶ The President of the European Court of Justice also referred to the Charter.¹⁹⁷ It appears that

several domestic courts made reference to the Charter when identifying obligations under international law¹⁹⁸ – that is, on much the same footing as the Court of First Instance. The Advocates-General to the Court of Justice have issued conflicting views.¹⁹⁹ But the Court of Justice has not expressed itself on the issue, also in cases where applicants referred to the Charter, and even when reviewing a judgement of the Court of First Instance whose reasoning relied on a Charter provision.²⁰⁰ As matters stand, it is unclear whether or not Charter provisions can successfully be invoked on the basis of Article 6(2) TEU before the Community judiciary.

[159] We should observe that if we assume that Charter provisions have legal effect in the way proposed by the Court of First Instance, it does not follow that each Charter provision will necessarily serve as a standard for legality review. The Court of First Instance did several times refer to Article 47 Charter, but only as “reaffirmation” of the existence of a general principle identified on the basis of Articles 6 and 13 ECHR (and the constitutional traditions of the Member States). It observed in this context that “[a]lthough [the Charter] does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order”.²⁰¹ Arguably, Charter rights that have no backing in international law or constitutional traditions may not be viable means for identification of general principles of Community law.²⁰²

Articles 19 and 47 Charter (the prohibition of refoulement and the right to a fair trial) have a firm ground in international law. This does not hold true for the “right to asylum”, but arguably, Article 18 Charter has counterparts in the constitutional traditions of the Member States (cf. number [112]). I do not know of a similar basis for the right to human dignity (Article 1 Charter).

References in secondary Community law

[160] The second way in which Charter provisions may work within the Community legal order is through references in secondary Community law. Most European asylum legislation contains a consideration in the Preamble stating that the relevant piece of legislation “respects the fundamental rights and observes the principles recognised in particular by the charter of Fundamental Rights of the European Union.”²⁰³ In particular, this legislation further “seeks to ensure full respect”²⁰⁴ or “observance”²⁰⁵ of the right to asylum (Qualification Directive, Dublin Regulation, and Reception Standards Directive), and of the right to human dignity (Qualification Directive, Reception Standards Directive). Obviously, these references to the Charter do

not render its provisions directly effective. But where secondary Community legislation itself states that the Charter at large, and the mentioned provisions in particular, serve as standards of review, relevant Charter provisions may serve for interpretation of that legislation. Arguably, where reference is made to the Charter in this way, its provisions have indirect effect.

2.3.8 Concluding remarks

[161] How does the protection as to asylum issues offered by the Charter and Part II of the Constitution, if and when they are binding, relate to the protection offered by general principles of Community law? The prohibitions on ill-treatment, *refoulement* and mass expulsion (Articles 4 and 19) have not been addressed in case-law of the Community judiciary, but, presumably, they are fit for recognition as general principles of Community law. In a sense, they have been codified in anticipation. As to Article 18, the matter is different: the Member States' "common constitutional traditions" may imply a similar obligation, but a "corresponding" obligation in international law does not exist. In this, Article 18 calls into existence a new right - to have one's right of asylum guaranteed.

In sum, Articles 4 and 19 are valuable as (anticipatory) codification of general principles of Community law. Article 18 is even more valuable, as a codification of a hitherto (at least partially) non-existent right.

[162] As to the scope of application of the Charter, Article 51 seems to codify current practice of the Community judiciary in terms of general principles: acts of Community institutions as well as Member States' implementing activities must comply with the rights concerned (the uncertainty as to applicability of the Charter to Member States' derogations from Community or Union law is not relevant as far as asylum is concerned. The same holds true for the requirement that Charter provisions be interpreted and applied in full accordance with relevant rules of international law, in particular the European Convention of Human Rights as interpreted by the Strasbourg Court.

As to the binding force of the Charter, currently Charter provisions cannot be successfully invoked before the Court of Justice. For most Community law on asylum legislation, however, the Charter arguably serves as a standard of review, by virtue of references to it in the Preambles to the mentioned instruments. After adoption of the Constitution, the Charter will rank as primary Union law.

2.4 Assessment

[163] All instruments of international asylum law are anterior to the transfer of powers on asylum to the European Community. It follows from relevant rules of international law that European asylum law does not affect the scope or content of the obligations of the Member States in their quality as signatories to the instruments of international asylum. International law offers two solutions for conflicts between obligations under international asylum law and obligations under Community law. First, Community law should be read and applied in a manner that conciliates it with international asylum law (Article 30(2) VTC). As Community law itself requires in various ways “accordance” of Community legislation and its application with international asylum law, this device may solve most conflicts. If conflicts cannot be solved this way, Article 307 TEC cedes precedence to international asylum. In case neither of these solutions applies, the conflict is insoluble under international law.

[164] Within the Community legal order, international asylum law may have effect in five ways. First, by virtue of reference to it in primary Community law (paragraph 2.2.3). According to Article 63(1) TEC, measures on “asylum” based on Article 63(1)(a) – (d) must be “in accordance” with the Refugee convention and “other relevant treaties”, and measures based on points (3) and (4) of the same provision must be “compatible” with “international agreements”. In this way, international asylum law is set as a direct standard of decision. Both “accordance” as well as, arguably, “compatible” entail that full compliance is required. Both Article 63(1) and the second last clause of Article 63 TEC set a standard of review for acts by Community institutions and for implementation and application acts by Member States.

[165] Second, international asylum law works within the Community legal order as a source of inspiration for general principles of Community law (paragraph 2.2.2). Any international treaty on human rights protection to which all Member States are party or in which they collaborated can serve as a basis for Community principles. It follows from the case law of the Luxembourg Courts that they apply to acts of Community institutions and to acts of Member States within the scope of Community law. As to the degree of observance they require, in recent case law the Court quite precisely applies international human rights law, carefully taking heed of pertinent case law from the European Court of Human Rights. In practice, the obligation to observe the general principles amounts to an obligation to act in accordance

with international treaty norms. Meanwhile, the Court's phrasing - "principles" which are "inspired" by international law - suggests a rather loose tie between principles and treaty provisions. This ambiguity is the main difference between the commitment to international asylum law through general principles on the one hand and the references to it in Article 63 TEC on the other.

For European asylum law, the general principles of Community law may have practical relevance in two respects. First, as standards for measures based on Article 63(2) TEC, as the treaty does not explicitly require that these are "in accordance with" or "compatible" with relevant treaty law. Second, general principles may be relevant for measures pursuant to Article 63(1), (3) and (4) TEC as well, as far as they entail rights that are not implied by the requirement of conformity with international law laid down in Article 63(1) and 63 second last clause TEC.

[166] Third, it appears from the case law of the Court of Justice that the Community is directly bound by international customary law (paragraph 2.2.1). Hence, the prohibition of *refoulement* works as a rule of international custom within the Community legal order. Its practical relevance for European asylum law next to the two above-mentioned ways of working of international asylum law is, arguably, modest, as the customary rule is much vaguer than the treaty norms on *refoulement*.

Fourth, international asylum law works through reference to it in secondary Community legislation (paragraph 2.2.4). The relevance of these references will be assessed in the discussion of the pieces of legislation concerned, in Chapters 4 till 8.

Fifthly and finally, international asylum law may work within the Community legal order as a means of interpretation of provisions of the Charter (paragraph 2.3). The legal status of this Charter is, currently, quite uncertain. Arguably, by virtue of references to the Charter in secondary Community law, it applies as a means of interpretation of these instruments.

[167] After the entry into force of the Constitution for Europe, international asylum law may still work in the same five ways within the Union legal order, but the relevance of the several ways will presumably be reversed. Of first and foremost importance will be the Charter provisions, which will apply as primary Union law. The provisions most relevant for asylum law, Articles 61, 78, 79 and 107, on human dignity, ill-treatment, asylum, expulsion and (as we will see in paragraph 6.3.1) procedures, must be interpreted and applied in accor-

dance with the European Convention of Human Rights, and of other relevant instruments of international law. These Constitution provisions address the major part of international asylum law. Moreover, they extend the scope of claims of persons in need of international protection. Article 78 recognises the right to asylum and requires that this right is guaranteed. Arguably, this entails additional requirements on the application of the exception of the safe third country: refugees should have access to a durable solution, and the conditions awaiting them should meet basic human rights standards. Further, it entails a claim on an appropriate status for those persons that remain within the European Union.

As far as international asylum law may warrant claims not covered by the Charter as incorporated into the Constitution, international asylum law may have effect within the Union legal order in the first and second ways discussed above: Article 266(1) requires compliance with international asylum law, and general principles may still apply, pursuant to Article 7(1) CfE (the successor to Article 6 TEU).

[168] How should we appreciate the proclamation of Charter of Fundamental Rights and its incorporation into the Constitution? One's appreciation will, at least partially, depend on the appreciation of the Court's testing of general principles of Community law. If one is sceptical about, in particular, the intensity of the testing of acts to those principles, one will welcome the Charter and the Constitution as they unambiguously commit the Community to the observance of human rights. As argued above, I think that the human rights case law of the Court of Justice already bears witness to such commitment: testing against general principles in fact amounts to an application of standards of international law. Still, the Charter and Part II of the Constitution are most valuable as codification of this practice. Besides, they appear to extend the scope of protection beyond the standards of international asylum law. *Mutatis mutandis*, the same applies to the importance of the direct references to international asylum law in Article 63(1) and Article 63 second last clause TEC.

[169] With the above-mentioned in mind, we can return to the questions stated in paragraph 1.2. First, European asylum leaves the claims of individuals to the Member States in their capacity as signatory states to the instruments of international asylum law unaffected (question 1b). Second, Community law must indeed be in accordance with international asylum law. The obligation to comply rests with Community institutions that adopt legislation on asylum as well as with the Member States (or Community institutions) that apply this

legislation (question 1a). This outcome has bearing upon a third issue, the opportunities that Community law offers the individual for giving effect to his claims under international law (the fourth question). With the obligation for the Community to act in accordance with international asylum law, these opportunities can only extend. The question of how claims to international law within the Community legal order can be given effect will be addressed in Chapter 9. Here, we should observe that the Community judiciary is not competent to review each and every Member State act with respect to its accordance with international asylum law. The scope of review of accordance with international asylum law is delimited by the scope of Community legislation on the matter. Thus, not every aspect of “qualification as a refugee” (Article 63(1)(c) TEC) falls within the scope of review of accordance with international law, only those aspects that fall within the Community legislation on the matter. We saw that the harmonisation ambitions as defined in the legislation are a relevant factor for delimiting the scope of this legislation, but the fact that a measure explicitly leaves the Member States discretion as to some aspect addressed in the measure does not remove that aspect from the scope of review of compliance with international law.

The content of the legislation on asylum, and its accordance with international law, will be discussed in Chapters 4 to 8. First, in Chapter 3, I will discuss the legal basis of this legislation in the Treaty on European Community, and in the Constitution.

NOTES

- ¹ Art. 26 VTC: “*Pacta sunt servanda - Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*”
- ² Article 34 VTC.
- ³ This holds true not only in situations where third states are involved, as the wording of Article 34 VTC might seem to suggest, but also if individuals invoke their rights under international asylum law. The European Commission of Human Rights observed already at an early date that “*the obligations undertaken by the other High Contracting Parties are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves*” (EComHR 10 January 1961, *Yb.* 1961, pp. 138-140 (*Austria v. Italy*)). The European Court of Human Rights has reaffirmed this “objective” character of the obligations under the ECHR (ECtHR 18 January 1978, Ser. A vol. 25 (*Ireland v. UK*), par. 239 and ECtHR 23 March 1993, Ser. A vol. 310 (*Loizidou v. Turkey*), par. 70)). See Lawson 1999, pp. 62-64.
- ⁴ Mus 1996, p. 35; cf. par. 1.4.2.1.
- ⁵ Sinclair 1984, p. 98. The issue has raised some debate, as some authors, notably Vierdag 1988, p. 93f, hold that the (subsequent) entry into force is the relevant moment. Mus 1996, pp. 46-48 argues that Sinclair’s vision is correct, drawing amongst other things on the discussions in the International Law Commission that prepared the VTC. For present purposes the issue is of little consequence, as the relevant date is defined in Article 307 TEC as the conclusion of the treaty; see par. 2.1.4 below.
- ⁶ Why the Treaty of Amsterdam rather than the Treaty of Rome from 1957 is the relevant treaty will be discussed below, in paragraph 2.1.4.
- ⁷ Brownlie 1990, pp. 624-625; Mus 1996, pp. 42-44.
- ⁸ Where the English text speaks of “specifies”, the French language version applies the term “précise”. The - equally authentic – Russian language version implies the wider scope: “Елси в договоре устанавливается [...]” – literally: “if it is stated in the agreement [...]”.
- ⁹ Mus 1996, pp. 42-44.
- ¹⁰ Hailbronner 2000, p. 38.
- ¹¹ An example is Article 103 of the UN Charter, whereto Article 30(1) VTC refers: “*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*”.
- ¹² We may observe that France never signed the Vienna Treaty Convention, precisely because of its persistent objections to the definition of *jus cogens* in Article 53 VTC. It appears however, that France does not object to the concept of *jus cogens* as such, but rather to the form of the first requirement (Hannikainen 1988, p. 212). Importantly, it did not object to the

acceptance of peremptory character of fundamental human rights (Lawson 1999, p. 171, quoting a statement by the French delegation to that extent).

¹³ Allain 2001; Gilbert 2003, somewhat implicitly, pp. 431-432 and 462.

¹⁴ Cf. number [19].

¹⁵ Allain 2001, p. 541n.

¹⁶ Which is by no means certain. Allain bases the requirement to observe the proportionality principle on a remark in the preparatory works (see Allain 2001, *l.c.*). But the text of Article 33(2) RC does not make mention of such a principle. In contrast, Articles 9 and 32(3) RC do reflect proportionality considerations.

¹⁷ Whereas Article 25 ILC Draft Articles on State Responsibility defines circumstances when necessity can be invoked as justification for non-compliance with a rule, including a proportionality test, Article 26 states that “*Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law*”.

¹⁸ Hannikainen 1988, p. 262.

¹⁹ Switzerland, as it appears from a judgement by the Bundesgericht of 22 march 1983 - Mus 1996, p. 74.

²⁰ Allain 2001, pp. 538-541 refers to ExCom Conclusion 25 (XXXIII) under (b), 1982, where it is stated that “*the principle of non-refoulement [...] was progressively acquiring the character of a peremptory rule of international law*”; and to ExCom Conclusion 79 (XLVII) under (i) of 1996, where it is stated that “*the principle of refoulement is not subject to derogation*”, thus allegedly hinting at *jus cogens* character, and to the Cartagena Declaration (1984 Cartagena Declaration on Refugees, III.5, OAS/Ser.L/V/II.66, doc. 10, rev. 1, pp. 190-193, reproduced in Goodwin-Gill 1998, p. 444f), which states that “*the principle of non refoulement [...] is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens.*” But ExCom Conclusions cannot duly be regarded as expressions the *opinio juris* of the international community as a whole (see number [32] above), and the Cartagena Declaration even less: the Cartagena Declaration was not adopted by states. It appears that the General Assembly of the Organisation of American States has “endorsed” the Declaration (Goodwin-Gill 1998, p. 21n), but it is highly speculative to infer from such endorsement a positive statement by those states that they hold the *opinio juris* that Article 33 RC indeed has peremptory character, and even less an *opinio juris* on behalf of the international community as a whole. Further, the purport of these statements is quite unclear. Should we infer that the second paragraph of Article 33 RC null and void?

²¹ Article 435 of the Constitution for Europe is identical to Article 307 TEC; hence, the following applies to Union law as well.

²² ECJ 14 October 1980, C-812/79, [1980] *ECR*, p. 2787 (*Burgoa*), par. 6; ECJ 2 August 1993, C-158/91, [1993] *ECR*, p. 4287 (*Lévy*), par. 11 and ECJ 4 July 2000, C-84/98, [2000] *ECR*, p. 05215 (*Commission v. Portugal*), par. 52.

- ²³ ECJ 4 July 2000, C-84/98, [2000] *ECR*, p. 05215 (*Commission v. Portugal*), par. 53. The reference to Article 30(4)(b) VTC is not at variance with the observation above that Article 307 TEC is a provision granting precedence as meant in Article 30(2) VTC. The rule of precedence laid down in Article 307 TEC is materially identical to the one in Article 30(4)(b) VTC, but the latter provision can apply only in the absence of a treaty provision as meant in Article 30(2) VTC.
- ²⁴ <http://www.unhchr.ch/html/intlinst.htm>, visited 10 October 2003.
- ²⁵ <http://www.unhchr.ch/tbs/doc.nsf/>, visited 10 October 2003.
- ²⁶ Article 8 VTC reads: “An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State”; according to Article 7(1) first clause, “A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if [...]”.
- ²⁷ Already ECJ 27 February 1962, C-10/61, [1962] *ECR*, p. 1 (*Commission v. Italy*) and confirmed in for example ECJ 14 October 1980, C-812/79, [1980] *ECR*, p. 2787 (*Burgoa*), par. 9.
- ²⁸ ECJ 14 October 1980, C-812/79, [1980] *ECR*, p. 2787 (*Burgoa*), par. 10.
- ²⁹ ECJ 14 October 1980, C-812/79, [1980] *ECR*, p. 2787 (*Burgoa*), par. 9.
- ³⁰ *Ibid.*
- ³¹ ECJ 2 August 1993, C-158/91, [1993] *ECR*, p. 4287 (*Lévy*), par. 22.
- ³² ECJ 2 August 1993, C-158/91, [1993] *ECR*, p. 4287 (*Lévy*), par. 21.
- ³³ ECJ 4 July 2000, C-84/98, [2000] *ECR*, p. 05215 (*Commission v. Portugal*), par. 58: “[...] in the context of Article 234 [now 307, HB] of the Treaty, the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded. [...]”.
- ³⁴ See *Mus* 1996, pp. 57f and 216.
- ³⁵ ECtHR 7 July 1989, Ser. A vol. 161; see for the facts subsequent to the Court’s judgement Lawson and Schermers 1999, pp. 327-328.
- ³⁶ ECtHR (Grand Chamber) 30 June 2005, appl. no. 45036/98 (*Bosphorus Hava Yollar Turizm ve Ticet Anonim Serketi v Ireland*).
- ³⁷ The issue of antecedence poses no problems where the 1957 Treaty of Rome and the ECHR are concerned: see Lawson 1999, pp. 480-482.
- ³⁸ ECtHR 18 February 1999, *Rep.* 1999-I (*Matthews v. UK*).
- ³⁹ The provision runs as follows: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.
- ⁴⁰ Article 138(3) EEC Treaty (old) provided, that the European Parliament should make pro-

posals for elections; the Council should “lay down the appropriate provisions, which it [should] recommend to Member States for adoption in accordance with their respective constitutional requirements”, hence as an agreement under international law. The Council laid down “appropriate provisions” in the “Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976”, attached to Council Decision 76/787. According to this “Act”, the United Kingdom would “apply the provisions of this Act only in respect of the United Kingdom” (cf. ECtHR 18 February 1999, *Rep.* 1999-I (*Matthews v. UK*), pars. 18-19).

⁴¹ ECtHR 18 February 1999, *Rep.* 1999-I (*Matthews v. UK*), par. 26.

⁴² ECtHR 18 February 1999, *Rep.* 1999-I (*Matthews v. UK*), pars. 31-32 and 34.

⁴³ ECtHR 7 March 2000, *Rep.* 2000-III (decision) (*T.I. v. UK*).

⁴⁴ *T.I. v. UK*, under *The Court’s assessment, The responsibility of the United Kingdom*.

⁴⁵ ECtHR 18 February 1999, *Rep.* 1999-I (*Waite and Kennedy*). On the same issue the Court issued a ruling with identical considerations in ECtHR 18 February 1999, *Rep.* 1999-I (*Beer and Regan v. Germany*).

⁴⁶ “The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial [...]” (*Waite and Kennedy*, par. 67; see also par. 9.5.1).

⁴⁷ *Bosphorus*, par. 137.

⁴⁸ *Bosphorus*, par. 148.

⁴⁹ *Bosphorus*, pars. 152-153 and 156.

⁵⁰ *Bosphorus*, par. 154.

⁵¹ *Waite and Kennedy*, par. 67; cf. *T.I. v. UK*, quoted under number [97]; and cf. *Matthews*, quoted under number [96], wherein the Court stated that “there is no difference between domestic and European legislation”, so in respect of European legislation, Member States must “secure” Conventions rights “in the same way as those rights are required to be secured in respect of purely domestic legislation” (par. 34).

⁵² *Bosphorus*, par. 157.

⁵³ *Bosphorus*, pars. 155-156.

⁵⁴ *Bosphorus*, par. 154.

⁵⁵ *Bosphorus*, par. 155.

- ⁵⁶ Article 281 TEC.
- ⁵⁷ For example ECJ 12 December 1972, C-21-24/72, [1972] ECR, p. 1219 (*International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*), par. 7, and ECJ 9 October 2001, C-377/9, [2001] ECR, p. 07079 (*Kingdom of the Netherlands v. European Parliament and Council of the European Union*), par. 52.
- ⁵⁸ Cf. Articles 39(2) RC, V 1967 Protocol, 48(1) CCPR, 59(1) ECHR, and 26 CAT.
- ⁵⁹ Cf. ECJ 28 March 1996, Opinion 2/94, [1996] ECR, p. 01759 (*Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*), pars. 33-34.
- ⁶⁰ Article 17 of the 14th Protocol ECHR (CETS no. 194) proposes a new Article 59(2) ECHR, which runs as follows: “*The European Union may accede to this Convention.*” This Protocol was adopted on 13 May 2004 and will enter into force after ratification by all States party to the European Convention (Article 19 of the 14th Protocol).
- ⁶¹ *OJ* [2004] C310, p. 420. One could even argue that for accession to the other treaties no explicit basis in primary Union or Community law is required. In Opinion 2/94, the Court of Justice pointed out that accession to the ECHR would “*entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as the integration of all its provisions into the Community legal order*” (par. 34). Thus, the supervision by the Strasbourg organs over Community institutions, including the Court of Justice, was a major factor for considering that the Treaty should make explicit provision for accession. Accession to the Refugee Convention, the CAT and CCPR does not entail entry into another institutional system, and as the relevant provisions have to a large extent been integrated into the Community legal order by Article 63(1) TEC, accession by the Community to those treaties would not constitute a “substantial change” as meant in *International Fruit*. Arguably, Article 308 TEC or 18(1) CfE, or the ERTA-effects (cf. number [202]) of Article 63 TEC or 266 CfE would provide for a sufficient basis for accession to those treaties.
- ⁶² ECJ 12 December 1972, C-21-24/72, [1972] ECR, p. 1219 (*International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*).
- ⁶³ Cf. Lawson 1999, p. 82, Vandamme 2001, pp. 107-108 who refer to *International Fruit*, pars. 10-17: “*It is clear that at the time when they concluded the Treaty establishing the European Economic Community the Member States were bound by the obligations of the General Agreement. [...] By concluding a treaty between them they could not withdraw from their obligations to third countries. [...] Since the entry into force of the EEC Treaty and more particularly, since the setting up of the common external tariff, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the General Agreement and has been recognized by the other contracting parties. [...] In particular, since that time, the Community, acting through its own institutions, has appeared as a partner in the tariff*

negotiations and as a party to the agreements of all types concluded within the framework of the General Agreement, in accordance with the provisions of Article 114 of the EEC Treaty which provides that the tariff and trade agreements 'shall be concluded ... on behalf of the Community'".

⁶⁴ *International Fruit*, pars. 14 and 15: “*The Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of Articles 111 and 113 of the Treaty. By conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under the General Agreement.*”

⁶⁵ *International Fruit*, pars. 12-13 : “[The Member States’] *desire to observe the undertakings of then general agreement follows as much from the very provisions of the EEC Treaty as from the declarations made by Member States on the presentation of the treaty to the contracting parties of the General Agreement in accordance with the obligation under Article XXIV thereof. That intention was made clear in particular by Article 110 of the EEC Treaty, which seeks the adherence of the Community to the same aims as those sought by the General Agreement, as well as by the first paragraph of Article 234 which provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty, and in particular multilateral agreements concluded with the participation of Member States, are not affected by the provisions of the Treaty.*”

⁶⁶ *International Fruit*, pars 16 and 17, quoted in footnote 53.

⁶⁷ ECJ 4 December 1974, C-41/74, [1974] *ECR*, p. 1337 (*Van Duyn v. Home Office*), par. 23.

⁶⁸ ECJ 16 December 1981, C-244/80, [1981] *ECR*, p. 3045 (*Pasquale Foglia v. Mariella Novello*), par. 24.

⁶⁹ ECJ 24 November 1992, C-286/90, [1990] *ECR*, p. 06019 (*Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*)

⁷⁰ *Poulsen*, par. 9.

⁷¹ “*In this connexion, account must be taken of the Geneva Conventions of 29 April 1958 on the Territorial Sea and the Contiguous Zone [...], on the High Seas [...], and on Fishing and Conservation of the Living Resources of the High Seas [...], in so far as they codify general rules recognized by international custom, and also of the United Nations Convention of 10 December 1982 on the Law of the Sea [...]. It has not entered into force, but many of its provisions are considered to express the current state of customary international maritime law [...]*” (*Poulsen*, par. 10).

⁷² ECJ 16 June 1998, C-162/96, [1998] *ECR*, p. 03655 (*A. Racke GmbH & Co. v. Hauptzollamt Mainz*), pars. 45 and 46.

⁷³ *Racke*, par. 52.

⁷⁴ See for an extensive description of this developments Craig and De Búrca 2003, pp. 318-323.

⁷⁵ See Betten and Grief 1998, pp. 64ff.

⁷⁶ For example ECJ 28 March 1996, Opinion 2/94, [1996] *ECR*, p. 01759 (*Accession by the*

Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms), par. 33; ECJ 18 June 1991, C-260/89, [1991] ECR, p. 2925 (*Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etaireia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*) (henceforth: *ERT v. DEP*), par. 41; ECJ 29 May 1997, C-299/95, [1997] ECR, p. 02629 (*Friedrich Kremzow v. Republik Österreich*), par. 14.

⁷⁷ Betten and Grief 1998, p.56; Besselink 1998b, p. 17. Article 220 TEC runs as follows: “*The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed*”. Cf. ECJ 25 July 2002, C-50/00, [2002] ECR, p. 06677 (*Unión de Pequeños Agricultores v. Council*), par. 38: “*The European Community is [...] a Community based on the rule of law in which its institutions are subject to judicial review of compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights*”.

⁷⁸ The first explicit reference to fundamental rights in primary Community law was the Preamble to the Single European Act, 17 February 1986, OJ [1986] L169: “[the Member States] DETERMINED to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice [...]”. Article F of the Treaty on European Union (established by the Treaty of Maastricht in 1993) provided that the Communities *casu quo* the European Union would respect fundamental rights guaranteed by the European Convention of Human Rights and by national constitutional traditions. These provisions however were not judicable.

⁷⁹ ECJ 28 March 2000, C-7/98, [2000] ECR, p. I-01935 (*Krombach v. Bamberski*), par. 27.

⁸⁰ CFI 2 October 2001, Joined cases T-222/99, T-327/99 and T-329/99 (*Martinez and de Gaulle v. European Parliament*), par. 231; ECJ 22 October 2002, C-94/00, [2002] ECR, p. 09011 (*Roquette Frères SA and Directeur général de la concurrence, de la consommation et de la répression des fraudes*), par. 24.

⁸¹ Cf. Lawson 1999, pp. 9-10 for an overview of relevant literature.

⁸² For example, reference to the CCPR is made in ECJ 18 October 1990, Joined cases C-297/88 and C-197/89, [1990] ECR, p. 3763 (*Massam Dzodzi v. Belgian State*), par. 68, and to the European Social Charter in ECJ 2 February 1988, C-24/87, [1988] ECR, p. 379 (*Vincent Blaizot v. University of Liège and others*), par. 17.

⁸³ *Roquette Frères*, par. 23.

⁸⁴ CFI 12 October 1999, T-48/96, [1999] ECR, p. II-03089 (*Acme Industry & Co. Ltd v. Council*), par. 30.

⁸⁵ For example, the Court explicitly tested a provision of a directive to Article 14 CCPR in its judgement of 18 October 1990, Joined cases C-297/88 and C-197/89, [1990] ECR, p. 03763 (*Massam Dzodzi v. Belgium State*), par. 68.

⁸⁶ Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Portugal and Spain (cf. Bouteillet-Pacquet 2002, pp. 221, 278, 315, 365, 403, 446f, 627 and 688).

⁸⁷ France, Germany, Italy, Portugal and Spain (cf. Bouteillet-Pacquet 2002, pp. 221). I have no data on the ten Member States that acceded in 2004.

⁸⁸ Cf. Hins 1998, pp. 18-19.

⁸⁹ According to Hailbronner 2000, p. 40 it follows from the Court's case-law that the European Convention of Human Rights can function as standards of review of "Community action only", not of "Member States' conduct". He supports this view by referring to the first two major rulings on the issue, the cases ECJ 11 July 1985, Joined cases 60-61/84, [1985] *ECR*, p. 2605 (*Cinéthèque SA and Others v. Fédération nationale des Cinémas Français*) and ECJ 30 September 1987, C-12/86, [1987] *ECR*, p. 3719 (*Demirel v. Stadt Schwäbisch Gmünd*). Later case-law of the Court puts beyond doubt that Community human rights review does cover Member States' conduct (see the main text immediately below). But moreover, I think that both *Cinéthèque* as well as *Demirel* at least allow for a reading that Member State conduct may be reviewed. In *Cinéthèque* the Court stated that "[a]lthough it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator" (par. 29; emphasis added, HB). Apparently, not *all* national legislation is exempt from the Court's human rights scrutiny, only such legislation that "falls within the jurisdiction of the national legislator" (and hence outside the field of Community law). In the *Demirel* judgement, the Court referred to *Cinéthèque*, stating that it had the duty to ensure the observance of fundamental rights "in the field of Community law", and continued that it "has no power to examine the compatibility with the European Convention on Human rights of national legislation lying outside the scope of Community law" (par. 28; emphasis added, HB). In the case concerned, the Court indeed had no jurisdiction as the national rules at issue "did not have to implement a provision of Community law", which implies that national legislation that serves to implement Community law surely does fall within the scope of its human rights scrutiny. That *Demirel* lost as the Court found that the issue involved – family reunification of third country nationals – was not covered at the time by Community law is another matter.

⁹⁰ *Cinéthèque*, par 26.

⁹¹ *Demirel*, par. 28.

⁹² ECJ 4 October 1991, C-159/90, [1991] *ECR*, p. 4685 (*SPUC v. Grogan and others*), par. 31. For *Demirel* and *Cinéthèque*, see the previous footnote.

⁹³ ECJ 18 June 1991, C-260/89, [1991] *ECR*, p. 2925 (*Elliniki Radiophonia Tiléorassi AE et al. v. Dimotiki Etairia Pliroforissis et al. (ERT)*), par. 42.

⁹⁴ Duijkersloot 1998, pp. 35 and 64; Weiler And Lockhart 1995, pp. 64-67.

⁹⁵ Duijkersloot 1998, pp. 39 and 40-42; Weiler and Lockhart 1995, p. 63-64.

⁹⁶ Weiler and Lockhart 1995, p. 64.

- ⁹⁷ ECJ 13 July 1989, C-5/88, [1989] *ECR*, p. 2609 (*Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*), par. 19.
- ⁹⁸ Cf. *Demirel*, see footnote 79 above.
- ⁹⁹ See for differing views on the Court's motives Coppel and O'Neill 1992 and Weiler and Lockhart 1995.
- ¹⁰⁰ And for example ECJ 22 October 2002, C-94/00, [2002] *ECR*, p. 09011 (*Roquette Frères SA and Directeur général de la concurrence, de la consommation et de la répression des fraudes*).
- ¹⁰¹ ECJ 12 December 2002, C-442/00, [2002] *ECR*, p. 11915 (*Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*) on Directive 80/987/EEC and ECJ 10 April 2003, C-276/01, [2003] *ECR*, p. 03735 (*Joachim Steffensen*), on Directive 89/397/EEC.
- ¹⁰² ECJ 3 December 1992, C-97/91, [1992] *ECR*, p. 6313 (*Oleificio Borelli SpA v. Commission*), par. 15.
- ¹⁰³ Cf. Leenders 1993, p. 62.
- ¹⁰⁴ Weiler and Lockhart 1995, p. 588.
- ¹⁰⁵ ECJ 12 December 2002, C-442/00, [2002] *ECR*, p. 11915 (*Ángel Rodríguez Caballero v. Fondo de Garantía Salarial (Fogasa)*).
- ¹⁰⁶ ECJ 13 June 1996, C-144/95, [1996] *ECR*, p. 02909 (*Maurin*). It is, as far as I know, the only case in which the Court explicitly addressed the limits of the scope of Community law where application of general principles on fundamental rights to implementation acts is concerned.
- ¹⁰⁷ *Maurin*, par. 9.
- ¹⁰⁸ Article 39(1) *jo* (3) TEC.
- ¹⁰⁹ ECJ 18 June 1991, C-260/89, [1991] *ECR*, p. 2925 (*Elliniki Radiophonia Tiléorassi AE et al. v. Dimotiki Etairia Pliroforissis et al. (ERT)*), par. 43. - The Court confirmed this in rulings on other Treaty provisions- Article 39 (ex 48, freedom of movement for workers: ECJ 23 September 2003, C-109/01, [2003] *ECR*, p. 9607 (*Secretary of State for the Home Department v Hacene Akrich*), Article 49 (ex 59, free movement of services: ECJ 11 July 2002, C-60/00, [2002] *ECR*, p. 06279 (*Mary Carpenter v. Secretary of State for the Home Department*)), Article 43 (ex 52, freedom of settlement of workers: ECJ 1 February 1996, C-177/94, [1996] *ECR*, p. 00161 (*Perfili*), pars. 17 and 20) and and Article 28 (ex 30, quantitative restrictions on imports: ECJ 26 June 1997, C-368/95, [1997] *ECR*, p. 03689 (*Vereinigte Familienpress Zeitungsverlags*), par. 24).
- ¹¹⁰ Coppel and O'Neill 1992, pp. 673ff.
- ¹¹¹ Craig and De Búrca 2003, pp.345-349, Duvigneau 1998, p. 73.
- ¹¹² ECJ 29 May 1997, C-299/95, [1997] *ECR*, p. 02629 (*Kremzow v. Republik Österreich*), par. 16 and ECJ 21 October 1999, C-97/98, [1999] *ECR*, p. 7319 (*Jägerskiöld*), pars. 42-45, repeated in a.o. *Carpenter*, par. 28.
- ¹¹³ See *Kremzow*, pars. 13 and 16. The Court delimits the scope of Treaty provisions other than the derogations of fundamental freedoms in a somewhat diverging way, see ECJ 18 decem-

- ber 1997, C-309/96, [1997] *ECR*, p. 07493 (*Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*), on Article 34 (ex 40) EC.
- ¹¹⁴ ECJ 5 July 1984, C-238/83, [1984] *ECR*, p. 2631 (*Meade*), par. 7; see Craig and De Búrca 2003, pp. 705 and 750f and Staples 1999, pp. 34f.
- ¹¹⁵ The issue is different for nationals of Member States requesting asylum, who can invoke Article 18 TEC, the freedom of movement for citizens of the European Union. For example, a domestic measure regulating detention of asylum seekers during procedures could be said to infringe upon that right. Still, it will be hard to fulfil the second requirement, sufficiency of the connection with the freedom of movement (cf. *Kremzow*, see footnote 102). However this may be, any ruling on asylum concerning only Union citizens would be of very limited practical importance to European asylum law, as the latter is mainly concerned with asylum requests by third country nationals.
- ¹¹⁶ ECJ 22 October 2002, C-94/00, [2002] *ECR*, p. 09011 (*Roquette Frères SA and Directeur général de la concurrence, de la consommation et de la répression des fraudes*), par. 23.
- ¹¹⁷ See ECJ 18 June 1991, C-260/89, [1991] *ECR*, p. 2925 (*Elliniki Radiophonia Tiléorassi AE et al. v. Dimotiki Etairia Pliroforissis et al. (ERT)*), quoted under number [108], and cf. Lawson 1999, p. 15.
- ¹¹⁸ Coppel and O'Neill 1992, p. 669; Phelan, quoted in Craig and de Búrca 1998, p. 34-341; Lawson 1999, p. 488.
- ¹¹⁹ Besselink 1998, p. 635.
- ¹²⁰ ECJ 10 April 2003, C-276/01, [2003] *ECR*, p. 03735 (*Joachim Steffensen*), pars. 69-70.
- ¹²¹ ECJ 23 September 2003, C-109/01, [2003] *ECR*, p. 9607 (*Secretary of State for the Home Department v Hacene Akrich*), par. 58.
- ¹²² Note in this respect the explicit reference in *Steffensen* to paragraph 23 from *Roquette Frères*, quoted in the previous paragraph, and to phrases in *Wachauf* and *Connolly* identical with or similar to the quote from *Roquette Frères*.
- ¹²³ ECJ 13 July 1989, C-5/88, [1989] *ECR*, p. 2609 (*Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*), par. 19 (see number [113] above).
- ¹²⁴ Coppel and O'Neill 1992, p. 684.
- ¹²⁵ Duijkersloot 1998, p. 43, referring to par. 22 of *Wachauf*.
- ¹²⁶ Weiler and Lockhart 1995, pp. 588-590.
- ¹²⁷ Viering 1998, pp. 76-77, 82-84, 88-89 and 96-97.
- ¹²⁸ Duvigneau 1998, p. 79.
- ¹²⁹ ECJ 21 September 1989, Joined cases C-46/87 and 227/88, [1989] *ECR*, p. 2859 (*Hoechst AG v. Commission*).
- ¹³⁰ ECtHR 16 December 1992, Ser. A vol. 251-B (*Niemietz*).
- ¹³¹ ECJ 22 October 2002, C-94/00, [2002] *ECR*, p. 09011 (*Roquette Frères SA and Directeur général de la concurrence, de la consommation et de la répression des fraudes*), par. 29.

- ¹³² See, for example, ECJ 6 March 2001, C-274/99, [2001] *ECR*, p. 1611 (*Conolly v. Commission*); cf. M. Blanquet in his comment on the judgment in *CMLRev* 2002, p. 1441.
- ¹³³ ECJ 17 February 1998, C-249/96, [1998] *ECR*, p. 621 (*Lisa Jacqueline Grant v. South-West Trains Ltd*), par. 46: “[...] the Human Rights Committee, which is not a judicial institution and whose findings have no binding force in law, confined itself, as it stated itself without giving specific reasons, to noting ... that in its view the reference to “sex” in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation”.
- ¹³⁴ Craig and De Búrca 2003, p. 326 however find the Court here “surprisingly dismissive” of the HRC views.
- ¹³⁵ Vermeulen 1994, pp. 58-9. Vermeulen mentions two more arguments against direct application of the European Convention of Human Rights in the Community legal order: the circumstance that not all Member States ratified all Protocols to the Convention, and the inability of the Community to sufficiently control implementation and application as required under Article 14 ECHR. As both topics are not or only very indirectly related to asylum law, I do not further address them.
- ¹³⁶ On the contrary, the remarkably strict test to Article 8 ECHR in *Akrich* may be due to the fact that the Court of Justice leaves the Member States a narrower margin of appreciation than the Strasbourg court does.
- ¹³⁷ Duvigneau 1998, p. 79 with references to authors who conclude likewise.
- ¹³⁸ Apart from Article 6 TEU and 63(1) TEC, reference to instruments of international law is made only in Article 136 TEC: “*The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions [...]*”. This standard is obviously far less strict than the one laid down in Article 63 TEC, and that therefore does not offer guidance.
- ¹³⁹ Thus, *refoulement* obligations may be engaged when aliens are transferred from one Member State to the other pursuant to legislation based on Article 63(1)(a) (cf. par. 7.5). Refugees whose status is being determined are entitled to many Refugee Convention benefits (cf. par. 8.7.1), which therefore may be relevant for “residence conditions for asylum seekers” (Article 63(1)(b)). The refugee definition in Article 1 RC is the subject of Article 63(1)(c) and obviously, procedural safeguards in international asylum law may be engaged by “rules on the granting or withdrawing of refugee status” (Article 63(1)(d)).
- ¹⁴⁰ Hailbronner 2000, p. 46.
- ¹⁴¹ So suggested by Hailbronner 2000, p. 43.
- ¹⁴² ECJ 13 July 1989, C-5/88, [1989] *ECR*, p. 2609 (*Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*), par. 19, quoted under number [113] above.
- ¹⁴³ Hailbronner 2000, pp. 46-47.
- ¹⁴⁴ Hailbronner 2000, p. 46.

- ¹⁴⁵ Von Bogdandy 2003, p. 41.
- ¹⁴⁶ Von Bogdandy 2003, pp. 39, 41.
- ¹⁴⁷ Hailbronner 2000, pp. 44-45.
- ¹⁴⁸ House of Lords, 19 December 2000, [1999] CA [2000] HL (*R. v. Secretary of State for the Home Dept., ex parte Adan and Aitseguer*).
- ¹⁴⁹ For instance, ECJ 14 December 1991, Opinion 1/91, [1991] ECR, p. I-06079, par. 14; further instances in P.J. Kuijper, ‘*The Court and the Tribunal of the EC and the Vienna Convention on the law of Treaties 1969*’, in: *LIEI* 25 [1998] no 1, pp. 1-23.
- ¹⁵⁰ Preamble RC, third and fifth indent, quoted under number [558].
- ¹⁵¹ Arguably, the same holds true for some other language versions - the Dutch “*verenigbaar*” versus “*in overeenstemming met*”, the French “*compatibles*” versus “*conformes*”, and the German “*vereinbar*” versus “*in übereinstimmung mit*”.
- ¹⁵² Otherwise Hailbronner, who states that the reason is that the Refugee Convention “*does not contain any standards as to the temporary protection*” (Hailbronner 2000, p. 81).
- ¹⁵³ Other examples are Article 14(6) QD and 20 PD.
- ¹⁵⁴ Though focusing on the relationship between the Community and the European Convention of Human Rights, Lawson’s analysis indeed has this broader implication: Lawson 1999, pp. 29-32.
- ¹⁵⁵ *Nemo plus juris transferre potest quam ipse antea habere*; see for example Schermers 1995, pp. 250f.
- ¹⁵⁶ Duvigneau 1998, p. 80.
- ¹⁵⁷ Lawson 1999, pp. 53-126.
- ¹⁵⁸ Hailbronner 2000, pp. 40-43.
- ¹⁵⁹ Lawson 1999, pp. 73-78.
- ¹⁶⁰ ECJ 14 October 1980, C-812/79, [1980] ECR, p. 2787 (*Burgoa*), par. 9.
- ¹⁶¹ Cf. Hailbronner 2000, pp. 40-43; Duvigneau 1998, p. 81, and cf. number [9].
- ¹⁶² *OJ* [2000] C364/1.
- ¹⁶³ “Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50”, doc. CHARTE 4473/00, CONVENT 49 of 11 October 2000, available at http://www.europarl.eu.int/charter/pdf/04473_en.pdf.
- ¹⁶⁴ The Preamble to Part II CfE also states that “*the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention*”. These “updated” or adjusted explanations are laid down in a Declaration incorporated in the Final Act under A of the Conference that adopted the Constitution in Rome on 29 October 2004 (*OJ* [2004] C310, p. 420f.).
- ¹⁶⁵ Article 52(1) Charter (Article 112(1) CfE): “*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of*

those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

¹⁶⁶ *OJ* [2004] C310, p. 456.

¹⁶⁷ See on the incongruities as to limitations, and the relation to limitation clauses in the ECHR: Triantafyllou 2002.

¹⁶⁸ The explanation to Article 19(1) of the Charter (“*Collective expulsions are prohibited*”), refers to Article 13 CCPR (CHARTRE 4473/00, p. 21, CONV 828/1/03 REV 1 p. 50).

¹⁶⁹ In Article 111(1) CfE (otherwise identical) mentions next to “institutions” and bodies, also “agencies” of the Union.

¹⁷⁰ Comparison with the field of application of principles of Community law reveals that infringements on fundamental freedoms are not mentioned; likewise, the Explanation refer only to ECJ case-law reviewing implementation acts (*OJ* [1994] C310, pp. 454-5). Several commentators hold that the provision thus endeavours to narrow the scope of application of the Charter provisions as compared to the general principles (cf. Jacobs 2001, p. 331; Craig and De Búrca 2003, pp. 347-8), but others doubt this intention (Alonso García 2002, pp. 3-6; Birkinshaw 2003, pp. 78-9). We may observe that the narrow definition of the scope of application in Article 46(d) TEU did not influence the Court of Justice’s practice. For asylum law the matter is not relevant: asylum rights could only in very exceptional circumstances, if ever, be involved in review of infringements on fundamental freedoms (cf. number [117]).

¹⁷¹ *OJ* [2004] C310 p. 354.

¹⁷² Article 52(5) CfE: “*The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality*”. - The provision has no counterpart in the Charter.

¹⁷³ Birkinshaw 2003, p. 78.

¹⁷⁴ *OJ* [2004] C310, p. 425.

¹⁷⁵ Preamble recitals (10) QD and (5) RSD; see also paragraph 8.7.5.

¹⁷⁶ *OJ* [2004] C310, p. 437.

¹⁷⁷ Grahl-Madsen 1972, p. 6.

¹⁷⁸ Cf. ECtHR 30 October 1991, Ser. A vol. 215 (*Vilvarajah*), par. 102.

¹⁷⁹ Cf. the fourth and sixth considerations of the Preamble to the Refugee Convention, where the Contracting states “consider” that “the grant of asylum may place unduly heavy burdens on certain countries”; “international conventions providing for the protection of refugees” are means for solving this “problem”; cf. paragraph 8.2.1.

¹⁸⁰ This follows from the absence of such a restriction in the text of Article 18, and is confirmed by the Explanation that states that “[t]his Article is in line with the Protocol on Asylum annexed to the Constitution” (*OJ* [2004] C310, p. 437).

- ¹⁸¹ According to Triantafyllou, the reference to the Refugee Convention serves as a limitation clause (Triantafyllou 2002, p. 7). If one assumes that “asylum” in Article 18 Charter means “Refugee Convention protection”, this may be true, but even then the term “due respect” indicates that the reference also serves to set a standard.
- ¹⁸² Cf. footnote 172 above, and see paragraph 6.4.5.
- ¹⁸³ *OJ* [2004] C310, p. 437.
- ¹⁸⁴ ECtHR 7 July 1989, Ser. A vol. 161 (*Soering v. United Kingdom*), par. 91, confirmed in ECtHR 20 March 1991, Ser. A vol. 201 (*Cruz Varas*), par. 69, ECtHR 30 October 1991, Ser. A vol. 215 (*Vilvarajah*), par. 107, and ECtHR 21 November 2001, *Rep.* 2001-XI (*Al-adsani*), par. 39.
- ¹⁸⁵ See Noll 2000, p. 428 on this technical meaning.
- ¹⁸⁶ See footnote 183.
- ¹⁸⁷ According to the Explanation, “*The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article*” (*OJ* [2004] C310, p. 428).
- ¹⁸⁸ For example Articles 11 and 10 Charter (71 and 70 CfE), on the freedom of expression and the freedom “to manifest” belief or religion, and Articles 4 and 3(1) Charter (64 and 63(1) CfE), on “the right to integrity of the person”, including “physical integrity”.
- ¹⁸⁹ *OJ* [2000] C364/1.
- ¹⁹⁰ Dutheil de la Rochère 2001, p.1
- ¹⁹¹ Cf. Craig and De Búrca 2003, pp. 161-2.
- ¹⁹² CFI 15 January 2003, Joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, [2003] *ECR*, p. II-1 (*Philip Morris International, Inc and Others v. Commission of the European Communities*), par. 122, quoted under number [159] below.
- ¹⁹³ Cf. Lenaerts and De Smijter 2000, esp. at pp. 128-129. Dutheil de la Rochère 2001 discusses why Charter provisions *should* serve so; cf. also Communication on the legal nature of the Charter of Fundamental Rights of the European Union (COM(2000)644final of 11 October 2000) and A-G Tizzano 8 February 2001, C-173/99, [2001] *ECR*, p. I-04881, observes that the Charter “*includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments*” (par. 27).
- ¹⁹⁴ Annex IV tot the Presidency Conclusions of the Cologne European Council of 3 and 4 June 1999 (http://www.europa.eu.int/council/off/conclu/june99/annexe_en.htm#a4): “*The European Council believes that this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law*”; cf. Dutheil de la Rochère 2001, p. 2 and Noll, Faegerlund and Liebaut 2002, p. 37.

- ¹⁹⁵ For example, in its judgement of 18 May 1982, C-155/79, [1982] *ECR*, p. 1575 (*AM & S Europe Limited v. Commission*), the ECJ accepted the principle of confidentiality between lawyer and client as a principle of Community law although the French government alleged it was merely a domestic rule of English law (Opinion A-G Arner 26 January 1982, C-155/79, [1982] *ECR*, p. 1575, 1631 (*AM & S Europe Limited v. Commission*)). In *Hoechst*, the Court coined a material yardstick, the existence of “not inconsiderable divergences in regard to nature and degree of protection” (ECJ 21 September 1989, Joined cases C-46/87 and 227/88, [1989] *ECR*, p. 2859 (*Hoechst AG v. Commission*), par. 17).
- ¹⁹⁶ CFI 30 January 2002, T-54/99, [2002] *ECR*, p. II-00313 (*Mobilkom Austria AG v. Commission*), par. 48; CFI 3 May 2002, T-177/01, [2002] *ECR*, p. II-02365 (*Jégo-Quééré & Cie SA v. Commission*), par. 42 and 47; CFI 5 August 2003, Joined cases T-116/01 and 118/01, [2003] *ECR*, p. II-02957 (*P & O European Ferries (Vizcaya) SA v. and Diputación Foral de Vizcaya v. Commission*), par. 209: “(...) It is settled case-law that the requirement of judicial review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (...). The right to an effective remedy has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union proclaimed on 7 December 2000 in Nice (...).”
- ¹⁹⁷ Order of the President of the Court 18 October 2002, C-232/02 P, [2002] *ECR*, p. I-08977 (*Commission of the European Communities v. Technische Glaswerke Ilmenau GmbH*), referring to Article 41 Charter in par. 85 and Article 47 in par. 117.
- ¹⁹⁸ Cf. *Birkinshaw* 2003, pp. 75-76 with references.
- ¹⁹⁹ A-G Jacobs has stated that measures violating fundamental rights as laid down in (amongst others) the Charter are unlawful (Opinion 14 June 2001, C-377/98, [2001] *ECR*, p. I-07079 (*The Netherlands v. European Parliament and the Council*), par. 197; cf. also Opinion of Advocate General Tizzano 8 February 2001, C-173/99, [2001] *ECR*, p. I-4881, par. 27), but according to A-G Geelhoed, “[a]s Community law currently stands, however, the Charter does not have any binding effect” (Opinion 12 July 2001, C-313/99, [2002] *ECR*, p. I-05719 (*Gerard Mulligan and Others v. Minister for Agriculture and Food, Ireland*), par. 28).
- ²⁰⁰ In its judgement on appeal from the CFI’s ruling on *Jégo-Quééré* (see footnote xcvi), ECJ 1 April 2004, C-263/02, n.y.p. (*Commission of the European Communities v. Jégo-Quééré & Cie SA*).
- ²⁰¹ CFI 15 January 2003, Joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, [2003] *ECR*, p. II-1 (*Philip Morris International, Inc and Others v. Commission of the European Communities*), par. 122.
- ²⁰² Cf. CFI 9 July 2003, T-223/00, [2003] *ECR*, p. II-02553 (*Kyowa Hakko Kogyo Co. Ltd and Kyowa Hakko Europe GmbH v. Commission*), par. 104: “Admittedly, Article 50 of the Charter [...] provides that no one may be tried or punished again in criminal proceedings

for an offence of which he has already been finally acquitted or convicted within the Union in accordance with the law. However, independently of the question whether that provision has binding legal force, it is clearly intended to apply only within the territory of the Union and the scope of the right laid down in the provision is expressly limited to cases where the first acquittal or conviction is handed down within the Union.” The new element of this *ne bis in idem* rule would be that it applied Union-wide.

²⁰³ Preamble recitals (10) QD, (8) PD, (5) RSD, (15) DR and (2) FRD. Of the Community measures on asylum, only the Temporary Protection Directive does not refer to the Charter.

²⁰⁴ Preamble recitals (10) QD, (8) PD, (5) RSD.

²⁰⁵ Preamble recital (15) DR.

Chapter 3

The Treaty basis for asylum legislation

In this Chapter I describe and analyse the competencies of the Community on asylum. Community legislation on asylum is, as any Community act, confined to “the powers conferred upon it by this Treaty and of the objectives assigned to it therein” (Article 5 TEC). Hence, in order to assess the validity of European asylum law, the scope of Community competence must be assessed properly. The analysis thus serves to answer the third question asked in paragraph 1.2 - to what extent can or must the Community issue legislation on asylum?

The various aspects of the legal basis for European asylum law in Title IV are discussed in paragraphs 3.1 to 3.7. In paragraph 3.8, I address the legal basis for asylum law in the draft Constitution for Europe.

3.1 Title IV in outline

[170] Title IV of Part III of the Treaty on European Community contains the legal basis for European asylum legislation. The basis of Community migration law is Article 61:

“In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

- (a) [...] measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of [...] Article 63(1)(a) and (2)(a) [...]
- (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63 [...].”

The provision defines the objective of Title IV measures as “progressively” establishing an “area of freedom, security and justice”. The scope of Community powers to achieve this objective is further defined by the Articles 62 – 65 TEC. The Community powers on “asylum, immigration and safeguarding the rights of third country nationals” (cf. Article 61(b)) are laid down in Article 63. The provision mentions “areas” concerning “asylum”, “refugees and displaced persons”, “immigration policy” in which Community measures should be adopted.

Other Title IV provisions are also relevant for asylum law. Article 64(1) states that

“the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”

is not affected by Title IV. Article 64(2) addresses an issue closely connected to asylum, Community powers to respond to “an emergency situation characterised by a sudden inflow of nationals of third countries”. Article 67 establishes the legislative procedures that were discussed in paragraph 1.5.4. Article 68 addresses the scope of jurisdiction of the Court of Justice, to be discussed in Chapter 9. Article 69, finally, refers to the Protocol on the position of the United Kingdom and Ireland and the Protocol on the position of Denmark, which have consequences for the geographical scope of Title IV measures (see further paragraph 3.5).

[171] Article 63, then, attributes powers on asylum matters to the Community. These powers are conditioned in four respects. Firstly, by the objective laid down in Article 61, the creation of an area of freedom, security and justice. Secondly, Article 63 defines the degree of harmonisation that Community measures can produce. Thirdly, Article 63 imposes the obligation to adopt measures on most asylum issues within five years of the entry into force of the Treaty, i.e. before 1 May 2004. Fourthly, Article 63(1) sets a standard for measures adopted on the basis of its sub-paragraphs: they must be in accordance with the Refugee Convention and other relevant instruments of international law. In order to assess the scope of Community competencies on asylum properly, these aspects must be taken into account.

Below, I will first address the meaning of the objective laid down in Article 61 first clause for asylum measures (paragraph 3.2). Subsequently, I will discuss on what aspects of asylum the Community can issue legislation (par. 3.3). In paragraph 3.4, the degree of harmonisation measures that Community legislation on asylum can produce will be discussed. The geographical scope of asylum measures will be addressed briefly in paragraph 3.5. The consequences of the delimitation of the scope of asylum legislation in Article 63 for Community obligations under international asylum law are addressed in paragraph 3.6.

3.2 The “area of freedom, security and justice”

[172] Article 61, first clause defines the objective of Title IV measures as the

progressive establishment of “an area of freedom, security and justice”. In the constitutional architecture of the Treaties on European Community and on European Union, powers in specific policy areas such as Title IV serve to achieve the more general goals of the Community and the Union at large.¹ Title IV measures serve to achieve the aim laid down in Article 2, fourth indent of the Treaty on European Union:²

“to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

Hence, the free movement of persons is the primary aim; the other measures are called for only in so far as they are “appropriate”.³

The area of freedom, security and justice does not figure among the objectives set out in Part One of the Treaty on European Community itself.⁴ Article 3 TEC mentions among the “activities” of the Community “an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital”, and “measures concerning the entry and movement of persons as provided for in Title IV”.⁵ This internal market is addressed by Article 14 TEC, which states that the “internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”. According to Article 61(a), this “area without internal frontiers” is one of the “aims” of Title IV measures.⁶

[173] But the objective of Title IV is not just the creation of the internal market, “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured” (Article 14(2) TEC). The creation of the “area of freedom, security and justice” serves other purposes as well, such as ensuring the security and safety of the peoples of the Member States. Those other effects are, in a sense, subsidiary, as they are aspired to because of the abolition of internal borders, the establishment of the freedom of movement. Still, those other effects are aspired to for their own sake; they are not merely instrumental to the establishment of the freedom of movement of persons. Hence, Title IV measures are not restricted to compensatory measures required for the establishment of the freedom of movement of persons.

[174] The European Union, then, is to be an “area of freedom, security and justice”. “Security” and even more so “justice” have only very limited signi-

ficance as objectives of European asylum law. The term “security” is closely connected to the prevention and combat of crime by Article 61(e), “justice” to judicial co-operation in civil and criminal matters by Article 61(c) and (e).⁷ The primary meaning of the latter term in English, French and German points at “law enforcement” rather than “equity”.⁸ Elements of European asylum law may serve to achieve these objectives; indeed, several provisions of the Community legislation on asylum serve to establish “security”.⁹ But the Preamble to the TEU limits “safety and security” to the peoples of the Member States, that is, to EU citizens.¹⁰ The same limitation figures in Article 29 TEU.¹¹ Security of and justice to third country nationals are hence not objectives of measures on asylum and immigration.¹²

[175] Asylum and immigration measures hence mainly serve the establishment of an “area of freedom”. It follows from Article 61(a) that this freedom encompasses the freedom of movement. Importantly, the provision applies the term “freedom”, not “freedom of movement”. That these notions are not identical follows not only from their wording, but also from the distinction that Article 61 draws between measures “directly relating” to the free movement of persons (Article 61(a) TEC) and “other measures” on asylum and immigration as meant in Article 63 (Article 61(b)). Apparently, those “other measures” are not “directly related” to the freedom of movement.

What kind of “freedom” are the “other” measures meant in Article 63 concerned with? Article 61(b) states that those other measures concern “asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63”. This enumeration does not juxtapose the “safeguarding of rights” next to asylum and immigration as subject matter addressed in Article 63, as no sub-paragraph of that provision addresses this safeguarding in particular.¹³ Arguably, the “safeguarding of rights of third country nationals” elaborates, rather, an aspect of the objective of creation of an area of freedom for Article 63. The requirement of Article 63(1), that measures on asylum be in accordance with the Refugee Convention and other relevant treaties, reinforces the interpretation of the term “freedom” as including human rights protection. Furthermore, the European Union and hence the area of freedom is “founded” on the principle of respect for human rights and fundamental freedoms.¹⁴ Hence, the creation of the area of freedom serves next to the establishment of the freedom of movement of persons also the respect for fundamental human rights of third country citizens.

[176] What are the implications for measures pursuant to the separate sub-

paragraphs of Article 63 TEC? According to Article 61(a), measures pursuant to Article 63(1)(a) and (2)(a) must serve the purpose of establishing the freedom of movement. The phrase “in conjunction with directly related flanking measures”, however, implies that they may also serve other purposes that serve the objective of creating the area of freedom, security and justice.¹⁵ The “other measures” pursuant to Article 61(b) are not restricted to the freedom of movement - they may serve any purpose within the scope of the general objective. Hence, all measures based on Article 63 may serve both establishing the freedom of movement as well as the safeguarding of human rights.

[177] In summary, the objective of Title IV measures is progressively establishing an “area of freedom security and justice”. The freedom of movement is obviously the central aim of the creation of this area. It follows from Article 2 and the Preamble to the Treaty on European Union that measures on asylum and immigration are “compensatory measures”. But this compensatory character does not reduce asylum and immigration measures to instruments for the creation of the internal market. Freedom, security and justice, not freedom of movement are the aspired results of the creation of the area. Asylum and immigration measures serve to create an area of freedom, which encompasses next to the freedom of movement for persons, the safeguarding of rights of third country nationals. It follows that Title IV empowers the Community to take measures on asylum and immigration in accordance with Article 63 that merely serve the protection of rights of third country nationals.

3.3 The scope of Community powers on asylum

3.3.1 Introduction

[178] Article 63 TEC lists the area of Community powers on asylum in much detail. It follows from Article 61 and 63 that Community powers are indeed limited to the issues mentioned. Article 61(a) and (b) confer the power to adopt measures on asylum and immigration “in accordance with the provisions of” Article 63. Hence, the Community cannot adopt just any measure on asylum and immigration serving the objective of progressively creating the area of freedom security and justice, but only measures for which Article 63 provides a legal basis.¹⁶ The scope of Article 63(1), (2) and (3) is defined by means of rather indeterminate terms (measures on “asylum”, “refugees and displaced persons” and on “immigration policy”), but then restricted to

“the following areas”. Community powers on asylum are therefore not comprehensive.¹⁷

[179] The delimitation of areas in Article 63 must be approached with some caution for two reasons. First, the provision serves several functions. Read in conjunction with Article 61, it attributes powers to the Community. These powers are defined in three respects: as to the subject matter, as to the scope of harmonisation, and as to the presence or absence of an obligation to adopt legislation within five years. The consequence of these various functions is that we must be very cautious with *a contrario* reasoning. The fact that, for instance, the issue of responsibility for asylum claims is mentioned separately in Article 63(1)(a) does not necessarily mean that this area is outside the material scope of “procedures”, addressed in Article 63(1)(d) – the reason for existence of the former Article might be the competence to provide for total harmonisation (cf. number [215]).

The second reason for caution is the occasionally somewhat poor drafting. For example, the relation between Article 62(1), on measures for abolishing internal borders, and Article 61 is unclear, as the latter does not mention the former.¹⁸ Further, Articles 61 and 63 TEC define three times which measures must be adopted within five years after the entry into force, and each time differently. According to Article 61(a) read in conjunction with Article 61(b), the time limit applies only to Article 63(1)(a) and (2)(a) measures. But the first clause of Article 63 requires adoption within five years for all Article 63 measures, whereas the final clause of Article 63 exempts Article 63(2)(b), (3)(a) and (4). Obviously, we should take no heed of other delimitations of the time limit but the last one – but it shows once again that *a contrario* reasoning is precarious.

In paragraphs 3.3.2 – 3.3.6, I will discuss in some detail the scope of the sub-paragraphs of Article 63 as far as relevant for asylum. In paragraph 3.3.7, I briefly address the external competencies of the Community pursuant to Article 63. The scope of another provision that may have bearings on protection issues will be discussed in paragraph 3.3.8: Article 64, on measures in case of sudden inflows. Finally, I briefly address how far other TEC provisions may serve as legal basis for Community measures on asylum.

3.3.2 The relation between Article 63(1), 63(2) and 63(3) TEC

[180] According to their first clauses, Article 63(1) addresses “asylum”,

Article 63(2) “displaced persons and refugees” and Article 63(3) “immigration”. The material scope of Article 63(3)(a) – “measures on [...] conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits”- is far broader than the scopes of the sub-paragraphs of Article 63(1) and, arguably, Article 63(2) (see pars. 3.3.3 and 3.3.4 below). Article 63(3)(a) specifically requires adoption of measures on family reunification, but does not exclude other grounds for entry or residence from its scope. This begs the question whether persons addressed in Article 63(1) and (2) fall within the scope of Article 63(3)(a) TEC. In other words, could Article 63(3)(a) serve as the legal basis for measures on refugees, displaced persons and asylum seekers?

[181] According to Article 61(a), measures meant in Article 63(2)(a) concern “immigration”. Hence, “measures on refugees and displaced persons” (Article 63(2), first clause) are measures on immigration, the subject-matter of Article 63(3).¹⁹ There is no reason why measures on “refugees” or “asylum seekers” as meant in Article 63(1) would not concern “immigration” too. At first sight, it may seem Article 61(a) and (b) oppose “asylum” to “immigration”. But Article 61(b) also speaks of the “safeguarding of the rights of nationals of third countries” as one of the elements of Article 63. Obviously, this “safeguarding of rights” is not opposed to, but rather concerned with measures on immigration and asylum (cf. number [175] above). Hence, these elements are not mutually exclusive. Arguably, the separate mentioning of “asylum” in Article 61(a) rather expresses that this specific category of “immigration” is subject to a special regime of international law, and that the measures called for in Article 63(1) should be dealt with accordingly. Consequently, the sub-paragraphs Article 63(1)(b), (c), (d) and (2)(a) are not opposed to (3)(a) *ratione materiae*.

Article 63(3)(a) read in conjunction with Article 61 thus implies that Article 63(3)(a) measures may address refugees, asylum seekers and displaced persons. Why, then, are the measures of Article 63(1) and 63(2) listed separately? The exercise of legislative power transferred to the Community is subject to the principles of subsidiarity and proportionality (cf. number [56]) – only if a certain measure is necessary to attain the objective established by the treaty, can the Community act. Apparently, the masters of the Treaty felt that legislation on the subject matter defined in Article 63(1) and (2) was necessary to create the area of freedom, and therefore stipulated in some detail that measures should be adopted on these issues. This they reinforced by imposing the time limit of 1 May 2004, which does not apply to Article 63(3)(a). In

addition, the separate listing of issues enabled them to explicitly stipulate conformity with international law for the most sensitive issues, and to permit total harmonisation of the subject-matter defined in Article 63(1)(a) (see paragraph 3.4).

[182] In summary, refugees and displaced persons fall within the scope of Article 63(3)(a). Hence, the Council may adopt legislation on both categories of persons pursuant to the latter provision, if Article 63(1) or (2) does not provide for a proper legal basis.

Notwithstanding the existence of the “residual” competence of Article 63(3)(a) for asylum matters, it does make sense to define the scope of measures under Article 63(1) and 63(2) in some detail, for four reasons. Firstly, since measures on the issues listed in Article 63(1) and (2)(a) have been adopted, the co-decision procedure applies to the subject matter mentioned in Article 63(1) and (2)(a), whereas the Article 67(1) procedure will continue to apply to Article 63(3) and (4) measures.²⁰ Secondly, it appears that different requirements as to compatibility with international asylum law apply to the several sub-paragraphs. For measures based on Article 63(1) and (3), compatibility with international law is explicitly required; no such explicit requirement is stated as to Article 63(2) and 64(2) (see paragraph 2.2.3). Thirdly, the Community can pursue total harmonisation on the issues mentioned in Article 63(1)(a) whereas it cannot on the other issues (cf. paragraph 3.4 below). Fourthly and finally, the definition of scope in Article 63(1) and (2) TEC gives some directions for the layout of the “Common European Asylum System” (cf. numbers [247] and [248]).

3.3.3 Asylum (Article 63(1) TEC)

[183] Article 63(1), first clause requires the adoption of measures on “asylum”. The reference to the Refugee Convention as well as Article 63(1)(c) and (d) connect the term “asylum” closely to refugees in the sense of the Refugee Convention.²¹ Asylum, then, must be understood as protection for Convention refugees, and the “asylum seekers” of Article 63(1)(a) and (b) as persons requesting protection under the Refugee Convention.

Article 63(2) also addresses “refugees”. Although no explicit reference to the Refugee Convention is made, given the context of Article 63(1) it is extremely unlikely that the term “refugees” is used in a colloquial sense. Moreover, the reference to displaced persons next to refugees would then be

devoid of any meaning. Arguably, Article 63(1) and (2)(a) both concern Convention refugees, but differ as to the *form* of protection. Article 63(2)(a) requires the establishment of a “temporary protection” regime for refugees and displaced persons (next to a regime for subsidiary protection, see par. 3.3.4). “Asylum” as meant in Article 63(1), then, is protection for refugees of (a more) permanent character. Indeed the ordinary meaning of “asylum” does have this connotation (see number [148]).

Personal and geographical scope

[184] The definition of the personal and geographical scope in the sub-paragraphs of Article 63(1) is not uniform. As to the personal scope, both Article 63(1)(a) (criteria and mechanisms for determining responsibility for asylum claims) as well as Article 63(1)(c) (qualification standards) only concern “third country nationals”. The personal scope of measures based on Article 63(1)(b) (reception standards) and (d) (procedures) is not explicitly restricted to third country nationals. Could they apply to Union citizens as well? According to Article 61(b), measures pursuant to Article 63 are concerned with “safeguarding the rights of third country nationals”. Further, it is most unlikely that the scope of Article 63(1)(b), “asylum seekers”, is wider than that of the third country nationals who “submitted an application for asylum” (Article 63(1)(a)). It is also unlikely that the “procedures for granting refugee status” would apply to a wider group of persons than the measures meant in Article 63(1)(a), (b) and (c). Finally, Article 63(1) concerns “immigration”, as we saw above. In the context of Title IV TEC, “immigration” can only mean immigration of third country nationals (cf. Article 61(b)). The Spanish Protocol, which provides for a special arrangement on EU citizens,²² endorses this reading of Article 63. Indeed, the legislation based on Article 63(1) excludes application to EU citizens.²³

Could Article 63(1) also apply to stateless persons, notwithstanding the references to “third country nationals”? The term “immigration”, and a reading of Article 63 in the context of the Treaty as a whole suggest that the provision concerns “persons who are not Union citizens”, hence not specifically persons possessing the nationality of a third country. The object and purpose of the provision, implying comprehensive measures facilitating the freedom of movement as well as the safeguarding of human rights, reinforce this reading. Indeed, the relevant legislation applies to third country nationals as well as to stateless persons.²⁴

[185] The geographical scope of measures based on Article 63(1)(a), (b) and

(d) is restricted to the territory of the Member States.²⁵ Article 63(1)(c), on rules for qualification as a refugee, does not contain such a restriction. Could the Community legislator adopt rules on qualification that apply to requests for asylum lodged outside the European Union (for instance, with Member States' consulates)? In this case, there are no strong contextual arguments for assuming an (implicit) limitation to the Union; neither Article 61(b) nor Article 63(3) contains any restriction to the territorial scope. As we will see below, measures on temporary protection certainly can apply to persons designated as their beneficiaries while still outside the European Union (see number [197] below). Finally, rules on qualification as a refugee for requests outside the European Union could be the same as those for persons within the Member States. But rules on allocation or reception of asylum seekers or procedures outside the European Union, for example at embassies, concern a completely different subject matter than the measures called for by Article 63(1)(a), (b) and (d). It therefore follows from the text and purpose of the provision, read in the context of Article 63(1) and (3), that the Community legislator can adopt measures on the qualification of third country nationals applying for asylum outside the Member States. It has not yet made use of the competence: the instrument adopted pursuant to Article 63(1)(c), the Qualification Directive, applies only to applications lodged at the borders and within the territories of the Member States (see paragraph 4.8).

Material scope

[186] Article 63(1)(a) TEC empowers the Community to adopt measures on “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum”. This definition is obviously inspired by the Dublin Convention (cf. number [43]). As this competence is the only one that is not restricted to minimum harmonisation, the delimitation of its scope merits examination in some detail.

At first sight, the provision draws a neat distinction between inter state issues, namely the determination of “responsibility” on the one hand, and matters concerning the relation between the Member State and the asylum seeker on the other (the “considering” of the asylum application). Article 63(1)(d) (on asylum procedures) addresses the “consideration” of the application. However, the determination of responsibility also entails some “consideration” of the application - identification of the asylum seeker and the way or place of entry into the European Union. If the state where the third country national applied for asylum finds out that another state is responsible, application of the criteria entails rejection of the application. Hence, procedural

issues concerning the relation between the state and the individual are involved.

[187] Does Article 63(1)(a) provide for powers on these procedural issues, or can the Community adopt legislation on the matter solely on the basis of Article 63(1)(d) (which provides, in contrast to Article 63(1)(a), only for minimum harmonisation)? Article 63(1)(d) addresses procedures for the granting of refugee status, which encompasses rejection of applications on any ground, for any rejection of an application for protection under the Refugee Convention is a decision not to grant refugee status.²⁶ Conversely, Article 63(1)(a) allows for measures on “criteria and mechanisms” only. Rules on procedures are, obviously, not “criteria”. The term “mechanisms” stands in marked opposition to “procedures” as applied in Article 63(1)(d) and 63(3)(a). Arguably, if the drafters had intended that Article 63(1)(a) would cover “procedures” between Member States and individuals in the context of the determination of responsibility too, they would have applied the term “procedures”. For it could perfectly well encompass both “procedures” in the narrow sense as well as mechanisms. It should further be noted that the Dublin “Convention determining the State responsible for examining applications for asylum lodged in one of the Member States” did not contain rules on how Member States should process applications.²⁷ And arguably, Article 63(1)(a) allows for complete harmonisation just because it does not address the relation between individual and state: the restriction of Community powers to set “minimum standards” serves to avoid collision of Community measures with international law (see paragraph 3.6). International asylum law has, primarily, bearing on the legal relation between individual and state, not to inter-state relations. The reading proposed above hence makes more sense of the division of power between the Community and the Member States laid down in the sub-paragraphs of Article 63. Consequently, legislation on procedural issues cannot be based on Article 63(1)(a), only on Article 63(1)(d) TEC.

Article 63(1)(a) serves as the legal basis for three regulations – the Dublin Regulation, the Dublin Application Regulation and the Eurodac Regulation on fingerprints. These will be discussed in Chapter 7.

[188] Article 63(1)(b) addresses “minimum standards for the reception of asylum seekers”. The term “reception”²⁸ is broad enough to encompass distribution to, and living conditions in reception facilities.²⁹ Both ordinary meaning as well as the context implies that “asylum seekers” are third country nationals whose request for asylum has not yet been decided upon.

The Council has adopted one measure for the implementation of Article 63(1)(b): the Reception Standards Directive, discussed in Chapter 8.

[189] Article 63(1)(c) empowers the Community to adopt “minimum standards with respect to the qualification of nationals of third countries as refugees”. In the light of the reference to the Refugee Convention in Article 63(1) first clause, its scope encompasses standards on the determination of refugee status. Determination of refugee status concerns all aspects of Article 1 RC, including cessation and exclusion.³⁰

There are good reasons to assume that measures on “qualification as a refugee” can also encompass legislation on the grounds for expulsion as meant in Article 33 RC (see paragraph 5.6.2). Persons to whom those grounds apply (can) qualify as Convention refugees. But importantly, the term “qualification” does not appear in the Refugee Convention; therefore, Article 63(1)(c) measures are not necessarily restricted to interpretation of only Article 1 RC. Further, it concerns measures on “asylum”, that is, measures on the grant of protection by a state. A reading in conjunction with Article 63(1)(d) endorses this reading (see under the next number). It follows that the qualification as a refugee in Article 63(1)(c) should be understood as qualification for asylum (Refugee Convention protection) on the ground that the person concerned is a Convention refugee.

The Council adopted one measure containing standards on the interpretation of the refugee definition: the Qualification Directive, discussed in Chapter 5.

[190] Article 63(1)(d) concerns “minimum standards on procedures in Member States for granting or withdrawing refugee status”. The term “procedures” is sufficiently broad to encompass both the examination of requests for asylum as well as appeal procedures.³¹

The term “status” is somewhat misleading as only protection can be granted or withdrawn, but not Convention refugee status. As recognition of Convention refugee status is a declaratory act, refugee status is recognised, not granted (see Chapter 8.2). As Article 63(1)(d) concerns “asylum”, it is reasonable to read the sub-paragraph as addressing procedures for the granting and withdrawing of residence permits. Article 63(3)(a) endorses this reading, as it speaks of “procedures for the issue by Member States of [...] residence permits”. Read in conjunction with the term asylum and Article 63(1)(c), the scope of the provision encompasses qualification for asylum (Refugee Convention protection) on the ground that the person is a Convention refugee, including application of the expulsion grounds of Article 32 and 33 RC.

[191] The Community legislator assumed that the criteria for assessing the safety of a third country (not being a Member State) in the Procedures Directive could be based on Article 63(1)(d).³² This reading puts much strain on the ordinary meaning of the term “procedure”: “the mode or form of conducting judicial proceedings (as distinguished from those branches of the law which define rights or prescribe penalties)”.³³ Criteria for assessing the safety of a third country do not concern the mode or form of the handling of a request for protection, but rather its very content, and concern the alien’s right to a residence permit. Moreover, Article 63(3)(a) distinguishes between “conditions on entry and residence” and “procedures for the issue [...] of [...] residence permits”. Arguably, criteria for assessing the safety of third countries do concern conditions on entry and residence, to which the term “procedures”, apparently, does not apply.³⁴ There is no reason to assume that the term “procedures” applied in Article 63(1)(d) has a different meaning. Hence, Article 63(1)(d) cannot serve as the legal basis for safe third country arrangements. The same holds true for the sub-paragraphs Article 63(1)(a), (b) and (c) because of their wording. The only viable legal basis for safe third country arrangements is therefore Article 63(3)(a), the “conditions on entry and residence”.

It should be observed that the above consideration addresses only the *criteria* for assessing the safety of the third country, not procedural rules on their application. A rule, according to which a claim for refugee protection is inadmissible if the safe third country criteria apply, would be a procedural rule on the grant of refugee protection as meant in Article 63(1)(d).

3.3.4 Temporary protection, subsidiary protection and sudden inflows (Articles 63(2) and 64(2) TEC)

Refugees and displaced persons

[192] Article 63(2) addresses “measures on refugees and displaced persons”. As stated above, the term “refugees” refers to refugees in the sense of Article 1 RC (see par. 3.3.2). The term “displaced persons” also occurs in international law,³⁵ but has not been defined in a binding instrument. The General Assembly and other United Nations organs employ the term “displaced persons” to indicate groups of persons in need of “assistance” or “protection”, next to Convention refugees. According to Article 1A(2) RC, being outside one’s home country is a requirement for being a refugee. Originally, the term “displaced persons” referred only to persons still within their country of ori-

gin, but for a long term, the term has also been applied to persons who crossed the border.³⁶ Thus, the term “displaced person” may apply to persons in need of protection outside their country of origin. Article 63(2)(a) employs the term in this sense as it speaks of “displaced persons who cannot return to their country of origin”. The context of Article 64(2) corroborates this reading (see below (number [199])).

Temporary and subsidiary protection

[193] Article 63(2)(a) speaks of “standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection”. The provision can be read in two ways.³⁷ In one reading, it calls for temporary protection for two categories of persons, but in a second one, for two forms of protection, each with its own personal scope. In the first reading “temporary protection” applies, first, “to displaced persons from third countries who cannot return to their country of origin”, and, secondly, “for persons who otherwise need international protection.” This last reading is problematic, as it is unclear what this second category entails. The only category of “displaced persons” who are not covered by the first category of Article 63(2)(a), “displaced persons who cannot return to their country of origin”, are persons who did not leave their country of origin. But Article 63(2)(a) concerns “immigration” according to Article 61(1)(a), not assistance (or protection) abroad.

According to the second reading, Article 63(2)(a) requires measures on, first, temporary protection and second, international protection “otherwise” – usually called “subsidiary protection”. This distinction does make sense (see below, number [181]). Moreover, in addition to the English one, various language versions appear to favour it to the first reading.³⁸

[194] “Temporary protection” applies to “displaced persons who cannot return to their country of origin” (Article 63(2)(a)). Can temporary protection apply to “refugees” in the sense of Article 63(2)? The first clause of Article 63(2), we saw, mentions “refugees” next to “displaced persons”. One could argue Article 63(2)(a) addresses only displaced persons (and that Article 63(2)(b) covers the “refugees” mentioned in Article 63(2) first clause). But both ordinary meaning as well as relevant UN documents (referred to above) suggest that “refugees” and “displaced persons” are not completely distinct categories. Moreover, object and purpose strongly suggest that temporary protection should apply to persons who (may) fulfil the requirements of Article 1 RC as well. Member States employ temporary protection schemes

in situations of mass influxes, when they are unable or unwilling to examine the refugee status of all applicants. Hence, in the practice of the Member States the category of temporary protection beneficiaries includes Convention refugees whose status has not yet been determined. If European temporary protection could not apply to Convention refugees, it would pose offer no alternative to examination procedures meant in Article 63(1). This would deprive temporary protection of all sense and meaning and hence be contrary to object and purpose. The “displaced persons who cannot return” to whom temporary protection applies, therefore encompass (unrecognised) Convention refugees.

[195] The second category of protection envisaged by Article 63(2)(a) TEC concerns “persons otherwise in need of international protection”. The term “international protection” is not defined in international law. In UN documents it means protection by international organisations (as opposed to “asylum”, protection by states).³⁹ There is no reason to suppose that this technical meaning was intended; as will be argued below, Article 63 does not provide the Community with the capacity to offer protection (see number [221]). It seems that the term international protection simply means protection by a state to a foreigner. Importantly, the scope of beneficiaries of this category of protection is not limited to specific grounds like, for example, applicability of international asylum law.⁴⁰ Nor does the definition of its personal scope as “displaced persons” by Article 63(2) first clause imply this restriction. The term “otherwise” opposes this category to temporary protection, as well as to asylum in the sense of Article 63(1).

The substantive scope

[196] Article 63(2)(a) TEC does not define on what aspects of temporary or subsidiary protection Community measures can or must be adopted – it speaks merely of “measures” on both forms of protection. It would appear that the provision provides for a legal basis for measures on all aspects of temporary or subsidiary protection. However, there are good reasons to define its substantive scope by reference to Article 63(1), and assume that Article 63(2)(a) provides a basis only for measures on the subject matter listed in Article 63(1) (allocation, reception, qualification and procedures).

Since the amendment of Article 67 by the Treaty of Nice, when “common rules and basic principles” on Article 63(1) and (2)(a) issues were adopted, the co-decision procedure applies (see number [66]). Measures concerning “asylum” that cannot be based on Article 63(1), such as secondary rights, must be

based on Article 63(3)(a) (see number [201]), and will therefore still be subject to unanimous decision-making. If Article 63(2)(a) provides a basis for measures on (*inter alia*) secondary rights, these measures would be subject to the co-decision procedure. As a consequence, the Treaty would make further harmonisation of residence conditions for subsidiary and temporary protection seekers far easier than such harmonisation for refugees. This result would be contrary to the purposes of Article 63. For the detailed definition of subject matter in Article 63(1) served to make sure that on those issues measures would be adopted before 1 May 2004; apparently, such extensive harmonisation was not required for temporary and subsidiary protection (see number [181] above). Arguably, the substantive scope of Article 63(2)(a) is, in a reading to object and purpose and within the context, limited to the issues listed in Article 63(1).

The geographical scope

[197] The scope of temporary and subsidiary protection is not explicitly restricted to persons “in the Member States” (cf. Article 63(1)(a), (b) and (d), see number [185] above). Hence, temporary and subsidiary protection can apply to persons who are still outside the European Union. Article 64(2) corroborates this reading (see number [193] above). But importantly, the provision concerns “immigration”. Hence, it cannot serve as the basis for schemes on protection abroad. Temporary protection for persons outside the Union therefore can only concern resettlement schemes and the like.

Burden sharing

[198] Article 63(2)(b) concerns measures for “promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons”, better known as “burden-sharing”.⁴¹ Burden sharing can take different forms; for present purposes, we may distinguish between financial and physical burden sharing, i.e. between distribution of costs and distribution of persons in need of protection. By decision the council has established a “European Refugee Fund” that serves to give the Member States financial support for reception of applicants, refugees, subsidiary and temporary protection beneficiaries, as well as for the costs of implementation of the various asylum measures.⁴² This financial support has no immediate consequences for the compatibility of European asylum law with international law, and will therefore not be further addressed in this study. The one measure thus far adopted on physical burden sharing however may have such consequences; see further paragraph 7.2.2.

Sudden inflows

[199] Article 64(2), finally, allows the Community to adopt “provisional measures” in case of “an emergency situation characterised by a sudden inflow of nationals of third countries”. This situation bears some resemblance to the situation of mass influxes in Article 63(2)(a). But whereas the latter provision addresses the grant of protection, Article 64(2) deals with public order. This follows from the context of Article 64(1), stating that public order remains outside the scope of Community power, to which Article 64(2) is the exception – for it allows the Council to adopt measures in case of an “inflow”. The “emergency situation”, then, is the situation in the Member State or states, and the threat to public order is the uncontrolled entry.⁴³ The term “inflow” is sufficiently wide to cover both the situation in which the third-country nationals have already flowed into the European Union, and the situation that the inflow is imminent, and the third-country-nationals are still outside the Member States.⁴⁴ In summary, Article 64(2) allows for Community measures combating uncontrolled entry,⁴⁵ or the consequences for public order of such uncontrolled entry.

Measures

[200] Two measures explicitly refer to Article 63(2)(a) as their legal basis: the Temporary Protection Directive, and the Qualification Directive as far as qualification for subsidiary protection is concerned (see Chapter 5). The Council adopted one measure on physical burden sharing pursuant to Article 63(2)(b), for temporary protection in the case of mass influxes (see Chapter 7.2.2). No decisions pursuant to Article 64(2) have as yet been adopted.

3.3.5 Immigration (Article 63(3) TEC)

[201] Article 63(3)(a) empowers the Community to adopt
“measures on immigration policy within the following areas: [...] conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion.”

Measures on immigration policy may include, we saw above, measures on refugees and displaced persons. The material scope is quite broad – conditions of entry and residence and procedures on the issue of residence permits encompass all subject matter covered by international asylum law. Article 63(3) may serve as a legal basis for issues concerning refugees or other beneficiaries of

international asylum law on issues outside the scopes of Article 63(1) and (2) (cf. number [182] above). One such issue was already discussed: criteria for assessing the safety of third countries (not being Member States, see number [191] above). Article 63(3)(a) further serves as the legal basis for standards for secondary rights for refugees and for subsidiary protection beneficiaries, laid down in the Qualification Directive, and for rules on family reunification for refugees, laid down in the Family Reunification Directive (see Chapter 8).

3.3.6 External competencies

[202] Hitherto we addressed the scope of the Community's internal powers, concerning legal relations with the Member States and their subjects. External competencies concern the Community's powers to engage in relations with third states and international organisations.

On some issues, the Treaty on European Community explicitly confers external powers to the Community. Of most interest for immigration at large is Article 310, empowering the Community to conclude "association agreements". The Community has not concluded any agreement concerning asylum issues on this basis.

Of more importance to European asylum law are the implied external powers of the Community. According to well-established case law of the Court of Justice, internal powers may give rise to (implicit) external powers (to so-called "ERTA-effects"), that is to Community competencies to conclude agreements and engage in other international activities.⁴⁶ Such external powers flow from Treaty provisions that explicitly confer internal powers, such as Article 63, as well as from actually adopted internal measures.

[203] On the basis of Article 63(1) TEC, the Community concluded in 2001 an agreement with Iceland and Norway,⁴⁷ that made the provisions of the Dublin Convention applicable on the transfer of applicants for asylum between the Member States and these states. The adoption of the Dublin Regulation and the Dublin Application Regulation, the successors to the Dublin Convention and related instruments, necessitated new agreements on the same matter. The Council authorised the Commission to start negotiations with both Iceland and Norway.⁴⁸ The Community has negotiated agreements with Denmark⁴⁹ and Switzerland⁵⁰ that should make the arrangements of the Dublin and Dublin Application Regulations applicable to these states. These agreements are discussed in Chapter 7.

3.3.7 The exception of Article 64(1) TEC

[204] According to Article 64(1) TEC, Title IV

“shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

As to asylum,⁵¹ public order questions could arise concerning several issues, in particular in the context of a mass influx of third country nationals and illegal entry. As a reservation concerning public policy matters, Article 64(1) TEC is not a novelty in Community law. According to Article 39(3) TEC, the freedom of movement for workers can be subjected to “limitations justified on grounds of public policy, public security or public health”; a similar clause can be found in Article 46(1), on the freedom of residence. We saw that restrictions to the market freedoms must be compatible with general principles of Community law, and that the Court of Justice can review this compatibility (see par 2.2.2.3). Should the public order clause of Article 64(1) be construed in the same way, to the effect that national measures that serve “maintenance of law and order” or “public security” are subject to human rights review by the Court of Justice?

According to Hailbronner, Article 64(1) expresses the premise that the realm of public order falls outside the scope of Community aliens law altogether.⁵² In contrast, the public order clauses Articles 39(3) and 46(1) TEC function as exceptions to the previously established right of free movement. Therefore, the case-law on the latter provisions cannot be transposed to Title IV, so he argues.

However, it should be observed the Court of Justice did apply the Article 39(3) approach to the public order exception to social policy issues under Article 118(old).⁵³ Non-involvement of fundamental freedoms hence makes no difference.⁵⁴ Apparently, the Court of Justice conceives of *ordre public* as a uniform concept.

[205] Does Article 68(2) lead to a different conclusion?⁵⁵ According to this provision,

“[i]n any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security”.

I think that this provision rather implies that public order issues do fall within the scope of Community law. If the matter fell outside Community law pursuant to Article 64(1), there would be no need to deny competence of the

Court of Justice, as the Court as a matter of course has no jurisdiction on issues lying outside the scope of Community law. Moreover, Article 68(2) explicitly restricts the Court's competence only as to measures pursuant to Article 62(1), the crossing of the internal borders of the Community. There is no clause that restricts in a similar way the scope of review of Member State action on the crossing of external borders because of public order considerations.

Article 64(1) hence functions in the context of Article 63 measures under the same conditions that apply to the public order clause in Article 39(3). The provision establishes that Member States can invoke public order considerations that justify exceptions to Title IV legislation. Such action must however comply with general principles of Community law. Article 68(2) TEC restricts the review of the Court of Justice only as regards restrictions on the freedom of movement within the Community, not as regards Member State action based on public order considerations concerning the crossing of the external borders.

3.3.8 Legal basis outside Title IV

[206] Can the Community adopt legislation on asylum on the basis of other provisions than Article 63 TEC? Obviously, Community powers outside Title IV do have consequences for third country nationals (that is, non-citizens of the Member States), hence for asylum seekers and beneficiaries. Article 137(3) TEC explicitly empowers the Community to legislate on "conditions of employment for third country nationals legally residing in Community territory". Further, third country nationals will profit indirectly from Community measures - the abolition of borders provides for an obvious example. Moreover, third country nationals may derive rights from provisions that address EU citizens. Thus, in the quality of family members or employees of EU citizens, a third country national may derive rights from the market freedoms of the former. But these instances do not concern Community law on asylum seeker or beneficiaries in that capacity, and therefore fall outside the scope of the present study.

[207] Could the freedom of movement of persons required by Article 14 TEC (Article 7A(old) TEC) serve as a legal basis for measures on asylum? Article 94 TEC provides for a legal basis for the adoption of measures that serve to establish the freedom of movement of persons as envisaged by Article 14.⁵⁶

This provision enables the Community to adopt directives in order to harmonise domestic law that directly influences the functioning of the common market.⁵⁷ Domestic asylum legislation may exert such influence. But the principle of *lex specialis derogat legi generali* forbids the use of the provision in case the carefully delineated competencies in Title IV do not provide a sufficient basis for Community action.

Finally, Article 308 enables the Community to take action if “it is necessary to obtain [...] the objectives of the Community and this treaty has not provided for the necessary powers”. But the Court of Justice has ruled that the provision

“cannot serve as the basis for widening the scope of Community powers beyond the general framework created by [...] those provisions that define the tasks and the activities of the Community.”⁵⁸

As Title IV defines both tasks as well activities of the Community, Article 308 cannot serve as basis for Community legislation asylum.⁵⁹

3.3.9 Concluding remarks

[208] Contrary to the first impression that Article 63 TEC might give, Community powers on asylum are not restricted to the areas listed in Article 63(1) and (2). Article 63(3)(a) attributes to the Community the competence to issue measures on entry, residence and procedures for third country nationals, including asylum beneficiaries, asylum seekers and persons in need of temporary or subsidiary protection, addressed under paragraphs (1) and (2) of Article 63 TEC.

Article 63(1) and (2) serve to carve out the obligation for the Community to adopt measures on the areas mentioned there within five years, to exempt Article 63(1)(a) measures from the limitation to minimum harmonisation applying to Article 63(3)(a), and, arguably, to state with emphasis the requirement of accordance with international asylum law of the issues listed in Article 63(1).

[209] Article 63(1) and (2) require Community legislation on three forms of protection – “asylum”, temporary protection for refugees and displaced persons, and subsidiary protection for persons in need of protection falling outside the scope of both asylum and temporary protection. “Asylum” is not (or not necessarily) of a temporary nature (as opposed to temporary protection), and reserved for recognised Convention refugees (as opposed to subsidiary

protection). The sub-paragraph devoted to “asylum”, Article 63(1), also addresses “asylum seekers”. For practical purposes, we should distinguish “asylum seekers” from recognised refugees and hence accept asylum seeker status as a separate, fourth protection category.

Temporary protection is not restricted *ratione personae* to a specific category of persons under international asylum law. It can apply to any category of persons who are outside their country of origin, and “cannot return” (cf. Article 63(2)(a) TEC). Article 63(2) first clause explicitly states that this form of protection may apply to “refugees”. Subsidiary protection does not apply to persons who are entitled to “asylum”, asylum seekers included, and to the beneficiaries of temporary protection. Otherwise, the scope is undefined. Article 64(2), finally, gives a special arrangement for the situation a mass influx causes an “emergency situation”. It addresses public order and serves as the legal basis for “provisional measures”, not for a separate protection status.

[210] Whereas Article 63(2) does not indicate which issues should be addressed by Community law on temporary and subsidiary protection, Article 63(1) requires legislation on four issues concerned with asylum. Article 63(1)(a) cannot serve as legal basis for rules on *procedures* concerning the application of criteria and instruments for deciding which Member State is responsible for considering an asylum claim. Article 63(1)(c) addresses qualification for asylum (Refugee Convention protection) on the ground that the person is a Convention refugee. Hence, it can serve as the legal basis for not only the interpretation of Article 1 RC, but also for rules on refusal or withdrawal of a residence permit because the expulsion grounds of Articles 32 or 33 RC apply. Likewise, Article 63(1)(d) addresses rules on procedures (examination as well as appeal procedures) on qualification for asylum on the ground that the person is a Convention refugee, including application of the expulsion grounds of Article 32 and 33 RC. The provision cannot serve as legal basis for legislation on criteria for assessing the safety of a third country. Such rules can be based only on Article 63(3)(a) TEC. The latter provision further serves as the basis for residence conditions for refugees and for rules on family reunification.

3.4 Harmonisation

The concept

[211] Harmonisation is the approximation of domestic law by means of

Community law standards. Harmonisation is only one of the devices for attaining the Community's objectives. Common market freedoms like the freedom of movement of persons may be established by the elimination of barriers to that freedom, an effect produced by directly effective Treaty provisions. Article 18 TEC, for example, requires freedom of movement of Union citizens, and prohibits domestic law requirements inhibiting this freedom. But domestic law producing those "obstacles" may serve legitimate interests – for example, the control on entry of non-EU citizens. On such issues, Community legislation is needed in order to establish the freedom of movement.⁶⁰ In areas of exclusive competence, the Community may impose a uniform system of Community law. In other areas, the Community may provide for harmonisation of law. Then, the Community sets (usually by way of directives) legal standards, which protect the concerned interests, while the freedom of movement is secured, because the standards apply equally in all Member States.

[212] The degree to which secondary Community law pre-empts domestic law differs in different areas. In some areas, the Treaty on European Community provides a legal basis for total harmonisation. In that situation, the Member States are not allowed to derogate from the adopted Community legislation. In other areas, Community law merely provides for minimum harmonisation.⁶¹ Such legislation does allow the Member States to introduce or maintain domestic regulations on the involved subject matter.⁶² Minimum harmonisation most frequently occurs in policy areas where the common market freedoms meet competing interests, such as environmental protection (Article 176 TEC) or social policy (Article 137(2) TEC).⁶³

A Community measure provides for minimum harmonisation if either its basis in the Treaty, or because the measure itself states so.⁶⁴ Thus, Article 176 states that "protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures"; Article 137(2) speaks of "minimum requirements", and Article 63 of "minimum standards". In the absence of indications in the relevant Treaty provision, it may follow from a rule of secondary Community law itself that it provides for minimum harmonisation, for example, if it employs the term "at least".⁶⁵

[213] Minimum norms, then, leave the Member States the freedom to introduce or maintain alternative domestic standards. This freedom is, obviously, not unfettered – otherwise, the Community measure would provide for no legal effect at all. Rather, minimum norms allow the Member States to deroga-

gate in one direction only: domestic standards may deviate from the Community norms only in favour of the addressee.⁶⁶ Besides, domestic standards derogating from Community standards are subject to the requirements of Community law. In the case law on the “minimum requirements” of Article 137 TEC, two conditions figure. Firstly, national measures may not “undermine the coherence of Community action” in the concerned area and secondly, they must be in conformity with the Treaty, such as the prohibition of discrimination and the exercise of fundamental freedoms.⁶⁷ The requirement of conformity with the Treaty is expressly stated for those measures in Article 137(5) TEC, but arguably, it applies to any domestic measure setting standards that exceed minimum norms, pursuant to Article 10 TEC (cf. number [56]). The Treaty may further provide for specific requirements on such domestic standards.⁶⁸

[214] The concept of minimum harmonisation addresses the division of powers between the Community and the Member States, not the specific content of Community measures. It does not restrict Community measures to a particular level of harmonisation. Hence, the minimum norm may set a very high level of protection.⁶⁹ The extent to which a Community measure may regulate a certain issue must be assessed by means of the principles of subsidiarity and proportionality.⁷⁰ Thus, Article 63(2)(a) for example empowers the Community to adopt measures on persons in need of subsidiary protection; a quite generally worded competence if compared to those laid down in Article 63(1). But the Community may adopt a measure laying down a detailed arrangement on, say, procedural rules for the granting and withdrawal of such protection only if it is established that this arrangement is necessary to achieve the objective. Conversely, Community institutions may be liable for failure to establish the requisite degree of harmonisation.⁷¹

It also follows that the Treaty does not require that the measures ex Article 63 set a particular minimum. Consequently, a reading of Article 63(1) TEC in conjunction with the reference to international law in Article 63(1) TEC does not entail that measures on reception, qualification as a refugee or procedures for granting or withdrawing refugee status should at least implement every relevant rule of international asylum law. Hence, Community measures are not invalid for violation of the Treaty if they do not or not fully address some relevant international law obligation. Still, the concept of minimum standards does have important implications for the assessment of conflicts between European asylum legislation and international asylum law. The issue will be addressed under number [217] below.

Harmonisation of law under Article 63 TEC

[215] Article 63 TEC distinguishes between two levels of harmonisation Community measures on asylum or immigration may produce. Firstly, it sets no limits on Community measures based on Article 63(1)(a), on criteria and mechanisms for determining which Member State is responsible for considering an application for asylum. These measures therefore can provide for total as well as for minimum harmonisation. What sort of harmonisation the measures adopted on this basis – the Eurodac, the Dublin and the Dublin Application Regulations – provide for, cannot be stated in general. Various provisions of the same measure may (and indeed do) bring total harmonisation on one issue, and minimum harmonisation on another one.⁷²

Secondly, measures based on Article 63(1)(b), (c), (d) and (2)(a) are explicitly confined to setting “minimum standards”. Consequently, Member States may introduce or maintain legislation exceeding Community standards on reception of asylum seekers, qualification for refugee status, procedures for the grant or withdrawal of such status and on temporary and subsidiary protection. Article 63(2)(b) empowers the Community to take measures “promoting a balance of effort”, which language indicates that the Community’s powers are limited.⁷³

The second final clause of Article 63 sets another standard for measures pursuant to Article 63(3) and (4). Such measures

“[...] shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.”

The requirement of compatibility with the Treaty must be read as compatibility with the Treaty and the legislation based on it, i.e. the Directives adopted on the basis of Article 63(3) and (4) TEC, the usual conditions for domestic measures exceeding minimum standards (see number [213] above).⁷⁴ Community legislation based on Article 63(3) and (4) therefore can produce only minimum harmonisation, not total harmonisation, and in this respect there is little difference with the minimum standards of Article 63(1) and (2).

[216] Why does Article 63 employ two different wordings for the restriction to minimum harmonisation in both sets of sub-paragraphs? Arguably, the reason is the existence or absence of previously existing domestic legislation on the relevant subject matter. The term “minimum standards” in Article 63(1)(b), (c), (d) and (2)(a) supposes that Member States did already operate legal systems on reception of asylum seekers, qualification as refugees, procedures, temporary protection and subsidiary and temporary protection. This is different as to the measures meant in Article 63(3) and (4). The Community

may adopt legislation formulating conditions for entry of categories of third country nationals, which has no forerunner in domestic law of the Member States. It is unlikely this difference entails any legal consequences.

Minimum standards and accordance with international law

[217] We saw above (numbers [212] and [213]) that Community law imposes three requirements on domestic law applicable to an area where Community law provides for minimum harmonisation. First, domestic standards that deviate from Community law standards are allowed for only when they favour the beneficiaries of the Community legislation. This requirement finds expression in all Directives on asylum: they all state that “Member States may introduce or retain more favourable standards [on the subject matter addressed by this Directive], in so far as those standards are compatible with this Directive”.⁷⁵ Delimitation of the scope of beneficiaries presents no problem as Article 63 itself defines them – “asylum seekers”, “refugees” and “displaced persons”.

More intricate is the question of when the Member States can set standards that are “more favourable” to those beneficiaries. If Community law sets standards for decisions that benefit the third country national - the grant of reception conditions, recognition as refugees of third country nationals fulfilling certain requirements and so on - there is no problem. But what when Community standards require *refusal* of reception conditions, recognition et cetera? A domestic measure that requires the grant of refugee status is obviously more favourable for third country nationals than a Community law that requires refusal. It follows that Community measures based on Article 63(1)(b), (c) (d) or (2)(a) and (3)(a) cannot impose the obligation to refuse. For if they did, they were not minimum standards. Consequently, Community minimum standards cannot entail an obligation to take a negative decision, and Community legislation must be interpreted accordingly.⁷⁶

Community law implies as a second requirement on domestic law deviating from minimum standards, that this domestic law may not undermine the unity of Community law. What this requirement entails for provisions of material European asylum law will be addressed in paragraph 4.5.

Third, the domestic standards must comply with the Treaty. For the present study, most relevant are those Treaty provisions that require respect for international asylum law obligations – Articles 6(2) TEU, 63(1) TEC first clause (accordance with the Refugee Convention and other relevant instruments) and the second last clause of Article 63 (the requirement of compatibility with international agreements). The consequences of these Treaty provisions were discussed in paragraph 2.2.3.

Conclusion

[218] In sum, Article 63 provides for two different levels of harmonisation. It sets no limit to Community measures on criteria and mechanisms for determining the state responsible for considering asylum applications (Article 63(1)(a) TEC). These measures may comprehensively regulate the matter.

For the remaining issues, Community measures can only provide for minimum harmonisation (pursuant to the term “minimum standards”, and to the second last clause of Article 63). This means that Member States may exceed the level of protection set by Community law to the benefit of the asylum seeker or beneficiary, if they do not jeopardise the unity of European law and observe their obligations under the Treaty on European Community. This implies that European asylum law on the issues mentioned in Article 63(1)(b), (c), (d), (2), (3) and (4) cannot prohibit the grant of residence permits or of conditions. If it did, then it did not set minimum standards and would therefore be in violation of primary Community law.

The term “minimum” does not address the content of the Community standards. Thus, the term does not prohibit the Council to set a level of protection that (far) exceeds the average or even highest level in the Member States (but the principles of proportionality and subsidiarity may prohibit such legislation, cf. number [56]). Conversely, the term does not require that Community standards should at least provide for protection at the level defined by international asylum law.

3.5 Geographical scope of European asylum legislation

[219] In principle, Community law applies to all Member States⁷⁷ – including the ten states that acceded on May 1st 2004. For Title IV measures, Denmark, Ireland and the United Kingdom have secured a special position by means of Protocols to the Treaty of Amsterdam (cf. Article 69 TEC).⁷⁸ Further, special arrangements under international law apply to Norway, Iceland and Switzerland (see paragraph 3.3.6 and 7.2.1).

According to the Protocol on the Position of Denmark, this Member State is not bound by Community legislation pursuant to Article 63 or 64 TEC or by case law from the Community judiciary on them.⁷⁹ Denmark can at any time revoke the Protocol; then, all Community measures apply.⁸⁰

Denmark is involved in European asylum law only in one respect: it does take part in the Dublin allocation system of applicants. Presently, where the determination of responsibility for asylum applications is concerned, between

Denmark and the other Member States, the Dublin Convention still applies;⁸¹ in the near future, the Convention will be replaced by a new agreement under international law between the Community and Denmark, reflecting the content of the Dublin Regulation (see further paragraph 7.1).

[220] Title IV measures do not necessarily bind Ireland and the United Kingdom.⁸² Either they can participate in (“opt in to”) the adoption of Title IV measures if they wish. They can take part in the adoption of a measure, if they inform the Council and the Commission of their wish to do so within three months of its proposal.⁸³ This entails no commitment to accept the result – if a measure cannot be adopted with the UK and Ireland taking part “within a reasonable period”, the other Member States may adopt it without them.⁸⁴ Further, both the UK as well as Ireland can opt in to measures adopted by the other Member States (if admitted by the Commission).⁸⁵ Like Denmark, but in contrast to the UK, Ireland may withdraw unilaterally from the Protocol.⁸⁶ Both states participated in the adoption of most of the measures on asylum (see paragraph 4.8).

3.6 Community powers on asylum and international asylum law

[221] Having analysed the scope of Community powers in some detail, we can now address their implications for obligations of the Community and of the Member States under international asylum law. First of all, we should observe that Article 63 TEC presupposes that the grant of protection is a matter for the Member States, not for the Community. The Community merely issues standards on reception, qualification and procedures; the reception, qualification and processing are done by the Member States. Article 63(3)(a) speaks of “standards on procedures for the issue *by the Member States* of residence permits and long-term visas”, and Article 63(1)(a) makes clear that “considering” applications for asylum, and hence the grant of them is the “responsibility” of the Member States.

Secondly, any obligations of the Community under international law pursuant to Article 63(1) TEC and so on are restricted to the standards it has set. Article 63 does not impose an obligation to secure that, for example, reception of asylum seekers in the Member States is in accordance with international asylum law – only its standards on the matter must comply. In particular, the characterisation as “minimum standards” does not imply that Community standards should minimally secure accordance with international asylum law (see number [218]).

[222] The legal character of legislation as minimum standards also has important consequences for the possibility that conflicts occur between such legislation and international law. As the Community is not bound to secure observance of international asylum law by the Member States, minimum standards that fall short of the level of protection required by international law can therefore not be in breach of the Community's own obligations pursuant to Article 6(2) TEU, Article 63(1) first clause or second last clause TEC. If the protection offered by a Community minimum standard falls short of the level required by international asylum law, the Member States are by definition free to set a higher protection standard, in conformity with their obligations under international law. Therefore, Community legislation that sets minimum standards cannot require Member State conduct in breach of international law. As a consequence, legislation that sets minimum standards cannot be invalid for incompatibility with international asylum law.⁸⁷

Confirmation for this view can be found in Opinion 2/91 by the Court of Justice, on the compatibility of Convention no 170 of the International Labour Organization with the Treaty, more specifically, with Article 118a(old) TEEC.⁸⁸ The latter provision, now Article 137 TEC, attributes the Community the competence to set minimum norms on labour conditions (cf. number [212]). When addressing the question of whether this Community competence is "exclusive in nature" (relevant for the Community's treaty making competence on the subject matter), the Court observed that

"[...] the provisions of Convention No 170 are not of such a kind as to affect rules adopted pursuant to Article 118a. If, on the one hand, the Community decides to adopt rules which are less stringent than those set out in an ILO convention, Member States may, in accordance with Article 118a(3), adopt more stringent measures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO convention. If, on the other hand, the Community decides to adopt more stringent measures than those provided for under an ILO convention, there is nothing to prevent the full application of Community law by the Member States under Article 19(8) of the ILO Constitution, which allows Members to adopt more stringent measures than those provided for in conventions or recommendations adopted by that organization."⁸⁹

The same reasoning applies to the relation between asylum legislation setting minimum standards and international asylum law. The latter does not preclude the offer of protection that goes further than required.⁹⁰

[223] Hence, minimum standards on asylum cannot be invalid for incompati-

bility with international asylum law. It follows that only legislation based on Article 63(1)(a), the Dublin Regulation, the Eurodac Regulation and the Dublin Application Regulation could be invalid.

Does this conclusion deprive the requirement in Article 63(1) first clause that Community asylum measures be “in accordance with” the Refugee Convention and other international law of all sense and meaning? Obviously, it does not. To begin with, Article 63(1) first clause demands that Community asylum law be interpreted in accordance with international law (a matter to be discussed thoroughly in Chapters 5 to 8). Further, it demands that European asylum law be applied in accordance with international law. And as to the validity of Community instruments, as far as I know no directive or regulation has ever been declared invalid by the Court of Justice because of incompatibility with general principles of Community law. Thus far, Community instruments could always be interpreted in a way that made their application in accordance with those principles possible. The characterisation by Article 63(1)(b), (c), (d) and (2) TEC of Community instruments on asylum as “minimum standards” simply means that those instruments *should* be interpreted in a way that makes their application in accordance with relevant international law possible. And eventually, it should be noted that the impossibility to successfully challenge the validity of minimum standards for incompatibility with international law in no way affects the protection under international asylum law required within the Community legal order. Community legislation containing minimum norms must be interpreted in accordance with international asylum law; the same holds true for domestic law within the scope of Community asylum law. As the relevant Community legislation sets minimum standards, it by definition leaves space for such interpretation in accordance with international law (or should be interpreted as doing so). If it turns out that Community legislation based on Article 63(1)(b), (c), (d), (2) or (3) TEC inhibits Member States to comply with their obligations under international asylum law, that legislation would be at variance with Article 63 TEC as it does not set minimum standards (and for that reason, is invalid). In such a case, international asylum law serves to define the “minimum character” of Community legislation.

3.7 Concluding remarks

[224] The question addressed in this Chapter was the extent whereto the Community can or must issue legislation on asylum (question 2 under number

[5]). Conclusions on the various aspects of the basis for asylum legislation in the Treaty on European Community can be found in the final sections of the sub-paragraphs (numbers [177], [208], [209] and [218]). Here, I list five findings of major relevance for the discussion of European asylum law further in this book.

First of all, the objective of asylum measures is not only the freedom of movement of Union citizens, but also the safeguarding of rights of third country nationals. European asylum legislation must be interpreted and applied accordingly.

Secondly, the Community is not bound to secure observance of international law as to the subject matter listed in Article 63 TEC. It must issue “standards” on those issues, and these standards must be in accordance with international law. But there is no obligation to set standards on each and any aspect of “qualification”, “procedures” and so on.

Thirdly, legislation on the subject matter listed in Article 63(1)(b) – (d), (2) and (3) TEC set “minimum standards”. These standards cannot detract from Member State competence to apply standards exceeding the level of protection set by Community legislation, as long as the domestic standards do not endanger the unity of Community law and comply with the Treaty. Therefore, minimum standards cannot impose obligations that adversely affect claims under international law. If secondary law prohibited observance of international law, it would not be a minimum standard and hence in violation of its Treaty basis. It further follows that where Article 63(1) TEC requires accordance with the Refugee Convention and other relevant treaty law, it does not define a minimum level that Community legislation should secure. Rather, secondary law may only partially address relevant international obligations.

Fourthly, the substantive scope of Community powers on asylum is not restricted to the subject matter listed in Article 63(1) and (2) TEC. Article 63(3)(a) provides for a legal basis for legislation on issues that may fall outside the scope of Article 63(1) and (2).

Fifthly, Article 63 TEC gives a few directions for the form and further content of European asylum law. The provision requires standards on four “statuses”: asylum status for Convention refugees, temporary protection status, subsidiary protection status and applicant status (cf. number [208]). Article 63(1) TEC requires rules on qualification and on procedures for asylum status, and rules for allocation and reception of applicants for this status. Article 63 does not require that all these issues must also be addressed by the standards on temporary and subsidiary protection. In this, asylum status enjoys a primary position *vis-à-vis* temporary and subsidiary protection. This is underlined by

the explicit requirement that the standards on asylum pursuant to Article 63(1) TEC are “in accordance with” the Refugee Convention and other relevant treaty law.

3.8 The Constitution

The draft Constitution for Europe envisages bringing some important changes to the Community (or Union) powers on asylum. The discussion below refers to the discussion of Title IV powers in the previous paragraphs, and focuses on differences with present Community powers.

3.8.1 Introduction

[225] In the Treaty establishing a Constitution for Europe (henceforth also: CfE), powers on asylum and immigration matters are laid down in Chapter IV of Part III (henceforth also: Chapter IV), addressing the “area of freedom, security and justice”. This Chapter is the successor to both Title IV of Part III of the Treaty on European Community, and to Title VI of the Treaty on European Union (the “third pillar” provisions on the area of freedom, security and justice; see number [172]). Section 1 of Chapter IV states “general provisions” that apply to the remaining three sections. It contains:

- the successor to the provisions that provide for a general legal basis, Article 61 TEC and its Title VI TEU counterpart Article 29 TEU, in Article 257;
- the *ordre public* reservation of Article 64(1) TEC and its Title VI TEU counterpart Article 33 TEU, in Article 262;
- a number of provisions on procedural issues, Articles 258-261 and 263-264.

Section 2 of Chapter IV, the Articles 265-269, is headed “Policies on border checks, asylum and immigration”. It contains the successor provisions to Articles 62, 63 and 64(2) TEC.⁹¹

[226] The “area of freedom, security and justice” reappears in the Constitution as one of the objectives of the Union, subject to some changes. According to Article 3(2),

“[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted”.

Different from the present Treaty on European Community, the Constitution explicitly appoints nationals of the Member States as the beneficiaries of the area.⁹² The relation between the area of freedom, security and justice and the internal market, still comprising “an area without internal frontiers”, remains ambiguous. By mentioning both together, Article 3(2) presents them as distinct, yet closely connected concepts.

According to “general provision” Article 257(1),

“[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal traditions and systems of the Member States.”⁹³

In this provision (the successor to Article 61 first clause TEC), no mention is made of the “citizens of the Union” as the beneficiaries of the area. Arguably, its scope is therefore wider than the scope of Article 3(2) CfE. Further, Article 257(1) CfE makes explicit the connection between the area of freedom, security and justice and respect for fundamental rights, only implicit in the present Treaties. This reference to fundamental rights fits in well with the stress on human rights protection elsewhere in the Constitution.⁹⁴ The aim of “safeguarding the rights of nationals of third countries” (Article 61(b) TEC) reappears as the stipulation that the “common policy on asylum, immigration and external border control [...] is fair towards third country nationals”.⁹⁵ The temporal aspect present in Article 61 TEC (which spoke of “progressively” creating the area of freedom) is absent.

Noteworthy, finally, is the elaboration of the area of freedom, security and justice in Article 257 (2), (3) and (4) CfE. The latter two sub-paragraphs work out the notions of “security” and “justice”, without any allusion to asylum or immigration measures. “Asylum”⁹⁶ and “immigration” are combined in one paragraph with the abolition of internal border controls – and hence more explicitly connected to the notion of “freedom” than under the present Treaties on European Community and on European Union.

[227] Union competencies on “asylum” and “immigration” are elaborated in Articles 266, 267 and 268 CfE. They address three issues for both policy fields:

- a common Union policy for “international protection” and for “immigration” should be developed (Articles 266(1) and 267(1) CfE; see paragraph 3.8.2 below);
- the areas of legislative competencies of the Union in both fields are defined (Article 266(2) for international protection, Article 267(2)-(5) CfE for immigration; see paragraph 3.8.5 below);

- solidarity and burden sharing among the Member States are addressed (Article 268 CfE; see number [244]).

Article 266 (3) CfE addresses Union competence in cases of emergency situations due to sudden inflows of third country nationals. This competence does in itself not concern asylum or international protection, but is relevant for the definition of Union powers on the temporary protection (see number [238] below).

3.8.2 The policy objectives

[228] The Union should “develop a common policy on asylum, subsidiary protection and temporary protection” (Article 266(1)). This policy should serve a twofold purpose: the offer of an “appropriate status to any third country national requiring international protection”, and “ensuring compliance with the principle of non-*refoulement*”. This policy “must be in accordance with the [Refugee Convention] and other relevant treaties”. The Constitution thus positions human rights considerations as the main purpose of asylum legislation, in a far more explicit way than the present Treaty on European Community does.

Article 267(1) requires a “common immigration policy”. This policy should serve a threefold purpose for “immigration” measures: “efficient management of migration flows”, “fair treatment of third-country nationals residing legally in Member States” and “prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.” Interestingly, human rights considerations on *entry* of third country nationals are absent, but Article 257(2) CfE requires that the policy on immigration should be “fair towards third-country nationals”. Unlike Article 63 second last clause TEC, Article 267(1) CfE does not explicitly require compliance with international law.

The provisions on these “policies” are relevant as Union powers in their own right. Moreover, they define the “purpose” of Union legislative powers on international protection and immigration (cf. Article 266(2) and 267(2) CfE, first clauses).

3.8.3 Personal and geographical scope

[229] Different from Article 63 TEC (see number [184]), Article 266(1) CfE

explicitly limits the scope of “international protection” measures to third country nationals, as Article 267(1) CfE does for immigration measures;⁹⁷ Article 257(2) CfE last clause explicitly includes stateless persons into the personal scope.

The geographical scope of both kinds of measures is not explicitly defined. Article 267(1) speaks of “efficient management of migration flows”, paragraph (2)(a) of “the conditions of entry and residence”. Hence, the provision provides for a legal basis for measures on residence applied for by third country nationals who are still outside the Union. Article 63(1)(a), (b) and (d) TEC are explicitly restricted to the territories of the Member States (cf. number [185] above). In contrast, their successors in the Constitution Article 266(2)(e), (f) and (d) are not. Moreover, the new competence laid down in Article 266(2)(g), on “partnership and co-operation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection” suggests that the “common policy on asylum, subsidiary protection and temporary protection” (Article 266 first clause CfE) may encompass legislation on asylum applicants and beneficiaries still outside the Union. This reading is reinforced by Article 266(1), which states that the measures should serve the purpose of the offering of appropriate status to *any* third country national requiring international protection. Hence, the Union may adopt measures in accordance with Article 266(2) concerning applicants still outside the Union.

3.8.4 Harmonisation

[230] A major difference between present Article 63 TEC and Articles 266 and 267 CfE concerns the targeted level of harmonisation. On most asylum issues, Article 63(1) and (2) TEC requires “minimum standards”. On most issues, Articles 266 and 267 CfE require adoption of “European laws or framework laws” – the Union equivalents to regulations or directives that are adopted in the co-decision procedure. But a restriction of asylum law to “minimum” standards is absent in the Constitution.

The sub-paragraphs of Articles 266 and 267 CfE define four levels of harmonisation. First, Article 267(4) explicitly excludes harmonisation in integration matters. Second, Article 267(2) and Article 266(2)(e), (f) and (g) (immigration, allocation and reception of protection seekers and co-operation with third countries) do not specify the level of harmonisation – they speak of “standards”, with no further qualification. Third, for temporary protection and for

procedures for asylum and subsidiary protection status, the level is defined at “common” standards (Article 266(2)(c) and (d) CfE). Fourthly and finally, Article 266(2)(a) and (b) call for no less than a “uniform” statuses for “asylum” and “subsidiary protection”. That the term “common” implies less uniformity than “uniform” follows not only from the ordinary meaning, but also from the preparatory works.⁹⁸

The difference between the harmonisation level set by Article 266(2)(a) – (d) CfE and Article 63(1) and (2) TEC reflects the distinction between the first and the second phases of harmonisation of asylum law as envisaged in the European Council Tampere Conclusions (cf. number [49]). According to these Conclusions, in the short term (before 1 May 2004) asylum measures should lay down “minimum conditions” or cater for “approximation of law” but in the longer term, for “a common asylum procedure” and “a uniform status”.⁹⁹ The latter policy objective has been codified in Article 266 CfE.

[231] What do these terms, and especially the term “uniform status” entail for the division of powers between the Union and the Member States? The Constitution explicitly distinguishes areas where it exercises “exclusive competence”, and areas of “shared” competencies of the Union and the Member States.¹⁰⁰ Asylum law, as part of the “area of freedom, security and justice” is a shared competence under the Constitution.¹⁰¹ Hence, the principles of subsidiarity and proportionality apply.¹⁰² Total harmonisation is for that reason not very feasible.¹⁰³

Still, total harmonisation is not excluded – the Union may provide for total harmonisation in fields of shared competencies, but only if the objectives can be better achieved in that way,¹⁰⁴ and the Member States can exercise their competence only “to the extent that the Union has not exercised [...] its competence”.¹⁰⁵

“Uniform statuses” can be established also in the absence of exhaustive harmonisation. If Union legislation sets high standards for international protection, Member States will be unwilling to exceed it. Then, the application of high Union standards on asylum or subsidiary protection status will in fact result in uniform asylum or subsidiary protection status.¹⁰⁶ Hence, the definition of statuses as “uniform” is not devoid of legal consequences. By calling for “uniform” statuses, high standards far more easily satisfy the requirements of subsidiarity and proportionality than further unqualified standards for mere “standards on statuses” would.

[232] One may argue that total harmonisation on any measure concerning

international protection is excluded by the definition of the Union policy on the matter in Article 266(1) CfE, and Article 266(2), first clause CfE, as establishing a “*common* European asylum system”, not a uniform one. But reading these terms as definitions of the scope of Union competency leads to unaccountable results. For the “common European *asylum* system” comprises next to asylum also subsidiary and temporary protection. And if the term “common” in the same phrase had the meaning it has in Article 266(2)(c), the “common asylum system” could not accommodate the “uniform statuses”. Finally, we should observe that the present Treaty on European Community makes total harmonisation on criteria and mechanisms for determining responsibility for protection claimants possible. A reduction of power by the Constitution can in itself not be excluded, but would hardly be compatible with the over-all picture. Arguably, the term “common European asylum system” does not address the scope of the relevant legislation, but rather establishes the requirement that the relevant legislation be a “system”, thus form a coherent whole.

In summary, total harmonisation in asylum matters is not excluded under the Constitution. But as the subsidiarity and proportionality apply to asylum legislation, it is not very feasible. The terms “uniform” and, to a lesser extent, “common” target a higher level of ambition than their counterparts in Article 63 TEC do.

3.8.5 Substantive scope

Comprehensive powers

[233] Article 266(2) defines the scope of the Union legislative powers on asylum matters. The provision commissions the Union to lay down legislative measures for a “common European Asylum system”, and further sets out under (a) to (g) in some detail what this System should “comprise”. The term “comprising” suggests that the list of issues that follows is not exhaustive. This is confirmed by a reading in conjunction with the provision on immigration, Article 267(2) CfE, that explicitly limits Union powers to the subject matter listed:

“[t]o this end [i.e. to establish the common immigration policy, see number [228]], European laws or framework laws shall establish *measures in the following areas* [...; emphasis added, HB]”.

Hence, the Union is competent to lay down measures for the purpose defined in Article 266(1), also if it concerns an area not specifically mentioned under

Article 266(2). In notable contrast to Title IV TEC, Article 266 CfE gives the Union comprehensive legislative powers on the whole field of international protection – with two caveats. First, Article 262 CfE precludes Union legislation that affects the exercise of “responsibilities” as regards the maintenance of law and order and the safeguarding of national security” (see number [225]). Second, the exercise of legislative power pursuant to Articles 266(2) CfE is subject to the principles of subsidiarity and proportionality. Measures on subjects not explicitly mentioned under one of the sub-paragraphs of that provision require further foundation.

Although the Union’s legislative powers on international protection are not confined to the issues listed under the sub-paragraphs of Article 266(2) CfE, the delimitation of the areas mentioned there is relevant for two purposes. First, they differ as to the degree of harmonisation that is envisaged. Second, the sub-paragraphs of Article 266(2) contain directions for the layout of the Common European Asylum System. Therefore, I will briefly comment on the substantive scope of Article 266(2).

Protection categories of the Common European Asylum System

[234] Article 266(1) introduces “international protection” as a generic term that encompasses “asylum”, “subsidiary protection” and “temporary protection”. It further introduces a distinction between on the one hand these categories of protection, and on the other hand “appropriate status” for those categories.

All three categories of international protection, as well as the distinction between “status” and “protection” reappear in Article 266(2) CfE. Sub-paragraph (a) provides for legislation on “a uniform status of asylum”. The term is not further defined, but a reading in conjunction with Article 78 CfE makes clear that asylum is protection for Convention refugees, like “asylum” as meant in Article 63(1) TEC.¹⁰⁷

Article 266(2)(b) calls for “a uniform status of subsidiary protection”. Its beneficiaries are defined as third country nationals who are in need of international protection, and did not “obtain European asylum.” The term “European asylum” is not defined, but obviously refers to “uniform asylum status” as meant in Article 266(2)(a). Both requirements – need for international protection, and non-applicability of “asylum” – are (implicitly) present in Article 63(2)(a) TEC (cf. par. 3.3.4 above).

Article 266(2)(c) speaks of a “common system of temporary protection”. Temporary protection applies to “displaced persons in the event of a massive

inflow”. The latter condition is absent in the present Article 63(2)(a) TEC, but present in the Temporary Protection Directive (see number [276] below). It follows from both the ordinary as well as the technical meaning of the term “displaced person”, that the beneficiaries of temporary protection may encompass Convention refugees and persons eligible for subsidiary protection. Thus, “temporary protection” differs *ratione materiae*, not necessarily *ratione personae* from “asylum” and “subsidiary protection”, just as under the present Treaty on European Community (see number [209] above).

Article 266(2)(e) addresses reception standards for a fourth category: applicants for “asylum or subsidiary protection” (cf. Article 63(1)(b) TEC that applies to “asylum seekers” only).

[235] Thus, the Common European Asylum System, we saw above, should comprise the four main protection categories of asylum (refugee protection), subsidiary protection, temporary protection and applicant protection. These are the same categories we encountered in Article 63 TEC.

As to the relation between these categories, we saw above that Article 63 TEC positions asylum in a primary position, and subsidiary next to temporary protection in a secondary one (cf. number [224]). Article 266(2)(b) does the same where it stipulates that subsidiary protection status applies only to aliens who did not qualify for refugee status (did not “obtain European asylum status”; cf. par. 5.8). But Article 266(2) treats subsidiary protection as quite a full complement to “asylum”, requiring “uniform statuses”, common procedures and rules for determining responsibility for applicants for both forms of protection (Article 266(2)(a), (b), (d) and (e) CfE). Further, Union legislation should address applicants for both statuses, not only “asylum seekers”, as under Article 63(1). Temporary protection occupies a secondary position next to asylum and subsidiary protection. Only for co-operation with third countries (Article 266(2)(g)), the three forms of protection are on the same footing.

Uniform statuses

[236] “European laws or framework laws shall lay down measures for a common European asylum system comprising [...] uniform statuses of asylum” and “of subsidiary protection” (Article 266(2)(a) and (b)). The term “status” refers to a legally defined position,¹⁰⁸ thus the position of the alien after the examination of his application. If read in this way, these provisions only address the issue of residence conditions, not the requirements for entitlement to those conditions.¹⁰⁹ Thus read, the Constitution does not address the competence to legislate on the requirements for obtaining refugee or subsidiary pro-

tection status – the very heart of all asylum law. In a broader interpretation, “status” concerns both residence conditions as well as grounds for entitlement to them. That the term “status” can have this meaning follows from the “Convention relating to the Status of Refugees”, addressing both the definition of who is a refugee as well as residence conditions.¹¹⁰ Article 266(2)(d) calls for “procedures for the granting and withdrawing of uniform asylum or subsidiary protection status”, and hence presupposes that the standards for the granting and withdrawing of those statuses fall within the area of Union powers. Obviously, the broad meaning serves the purpose of Article 266(2)(a) and (b) better than the narrow one does. Hence, the term “status” must be interpreted as addressing both entitlement to residence conditions as well as standards for granting or withdrawing them – or in the terms of the Constitution, standards for “obtaining” them.

[237] Both statuses should be “uniform”. The meaning of this term was discussed above (number [231]). The qualification “uniform” applies to the statuses in both respects: the residence conditions as well as the standards for granting or withdrawing entitlement to them must be uniform in all Member States. Obviously, the Constitution does not call for one uniform status for both refugees as well as subsidiary protection beneficiaries; that is, the content of the refugee status may differ from that of the subsidiary protection status.

According to Article 266(1), the statuses should be appropriate. The relevant legislation must be in accordance with the Refugee Convention according to the same provision. Arguably, “uniform asylum status” should be up to Refugee Convention standards, whereas subsidiary protection status may convey fewer benefits, if “appropriate”.

In one respect, the Constitution itself draws a distinction between both statuses: the asylum status should be “valid throughout the Union”, a requirement that does not apply to subsidiary protection status.¹¹¹ The meaning of this requirement is not evident from its wording. As subsidiary protection status must also be “uniform”, it can hardly be “invalid” in other Member States than the one that issued the status, in the sense that other Member States could deny that the uniform subsidiary protection status holder is indeed entitled to his status. It therefore seems that the requirement rather addresses the other component of the status, the residential rights of refugees. It follows from Article 267(2)(b) that “the rights of third-country nationals legally residing in a Member State” include “the conditions governing freedom of movement and of residence in other states”. Arguably, the requirement that asylum status be valid throughout the Union elaborates on the last mentioned issue. It then

entails that uniform asylum status beneficiaries should enjoy the benefits of Union law, in particular the fundamental freedoms on much the same footing as Union citizens.¹¹² Apparently, uniform subsidiary protection status should not or not necessarily convey this benefit.

Temporary protection and measures for sudden inflows

[238] Article 266(2)(c) CfE asks for “a common system of temporary protection”. A “status” for this category is not mentioned, but it follows from Article 266(1) that one of its objectives is the offering of “appropriate status” to those in need of temporary protection.

Article 266(3) CfE states that

“[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt European regulations or decisions comprising provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament”.

The provision is the successor of present Article 64(2) TEC. Like the latter provision, Article 266(3) is primarily concerned with public order, not with protection: the measures should serve “the benefits of the Member State concerned”, not the interests of the third country nationals.

As to the personal scope, in paragraph 3.3.4 we noticed that Article 64(2) TEC can apply to displaced persons inside as well as outside the Union, so in contrast to Article 63(2)(a) TEC (on international protection). The Constitution applies the same term “inflow” in Articles 266(2)(c) and 266(3) CfE as applied in Article 64(2) TEC.¹¹³ Further, “displaced persons” are not defined in Article 266(2)(c) as “persons who cannot return to their country of origin” (as in Article 63(2)(a) TEC). Arguably, Article 266(2)(c) and 266(3) CfE may both address displaced persons inside and outside the Union. The latter provision sets two additional requirements, absent in the former: the inflow must be “sudden”, and it must cause “an emergency situation”. Only then the “provisional measures” meant in 266(3) “may” be adopted. Temporary protection on the other hand applies only when inflow is “massive”. Apparently, “sudden inflows” in the sense of Article 266(3) need not be “massive”.

The measures that the Council may adopt pursuant to Article 266(3) are “European regulations or decisions” – legislative tools for whose adoption consent of the European Parliament is not required.¹¹⁴ This type of decision-making obviously allows for a quick response. The measures can only be “provisional”, but the strict time limit of six months for application (Article 64(2) TEC) is absent.

Common procedures

[239] Article 266(2)(d) calls for “common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status”. Different from Article 63(1)(d) TEC, the provision addresses “subsidiary protection” next to “asylum”. The requirement that those procedures be “common” rather than “uniform” bears evidence of a lower harmonisation ambition (see number [230] above). The restriction to “uniform asylum or subsidiary protection status” entails that Member States remain free to operate alternative procedures on the grant or withdrawal of other forms of protection – including “asylum” or “subsidiary protection” not covered by the mentioned statuses.

As to the set-up of the common procedures, the provision allows both for separate procedures for asylum and for subsidiary protection, as well as for one single procedure for both statuses. For the plural “procedures” does not necessarily imply separate procedures, as it may address the distinction between the procedure for granting and the one for withdrawing. Nor is the rest of the clause conclusive. Arguably, the requirement of a single procedure would have needed explicit wording.

Reception and criteria and allocation

[240] Contrary to Article 63(1)(b) TEC, Article 266(2)(d), the legal basis for reception conditions, explicitly includes subsidiary protection claimants. The wording “applicants for asylum *or* subsidiary protection” allows the Union legislator both to treat applicants as one group, and to distinguish between both categories.

Article 266(2)(e) differs in only one respect from Article 63(1)(a) TEC: the “criteria and mechanisms for determining which Member State is responsible for considering an application” concern applications for subsidiary protection as well as for asylum.

Co-operation and partnership with third countries

[241] Finally, Article 266(2)(g) CfE calls for “partnership and co-operation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection”. It is the only competence on international protection that has no predecessor in the present Treaty on European Community.¹¹⁵ The “partnership or co-operation” may only pursue the managing of “inflows” of protection seekers. This suggests that a nexus with the functioning of the common European asylum system as established on the basis of Article 266(2) (a) – (f) is required. This requirement is reinforced by the delimitation of the “inflows” *ratione personae* to “people apply-

ing for asylum or subsidiary or temporary protection” – not, for example, to “displaced persons” in general.

What kind of issues could be addressed by “partnership and co-operation” with third countries as envisaged by Article 266(2)(g)? An important issue would be external processing of applications for protection.¹¹⁶ Another issue for co-operation with third countries could be readmission agreements, but that matter is addressed by Article 267(3) CfE (see number [242]).

Immigration

[242] Article 63(3)(a) TEC may serve as the legal basis for measures that address the persons within the scope of Article 63(1) and (2) – asylum seekers, asylum beneficiaries and beneficiaries of temporary and subsidiary protection. The same holds true for immigration measures pursuant to Article 267(3) CfE: neither the purposes of immigration measures nor the personal scope excludes third country nationals addressed by Article 266 CfE.¹¹⁷

As to the substantive scope, Article 267(2)(a) addresses “conditions on entry and residence, and standards on the issue of long term visas and residence permits, including those for the purpose of family reunion”. This wording is identical to Article 63(3)(a) TEC, except for the substitution of the term “standards” for “procedures”, which broadens the substantive scope. Article 63(3)(a) TEC, read in its context and to object and purpose, addresses not only conditions for acquiring the right to reside, but also the definition of residential rights (cf. par. 3.3.2 and 3.3.5). Article 267(2)(b) offers a separate legal basis for the second issue, “the definition of the rights of third country nationals residing legally in a Member State”. This includes “conditions governing freedom of movement and of residence in other Member States” – the subject matter of Article 63(4) TEC.

The scope of both sub-paragraphs overlaps with Article 266(2)(a), (b) and (c), the “uniform status” for asylum and for “subsidiary protection” and the “common system for temporary protection”. All three provisions encompass the definition of residential rights. This includes conditions on freedom of movement and residence in other Member States (cf. Article 267(2)(b) and the requirement of validity throughout the Union of the uniform asylum status, Article 266(2)(a) – see number [237] above).

[243] As Union competencies on international protection are not limited to the specific areas listed in Article 266(2) CfE (see number [233]), there is no need to take recourse to powers on “immigration” as under Article 63 TEC (number [182]). As far as the delimitation of asylum and immigration powers is

concerned, the Union competence to provide for standards on family reunification for protection beneficiaries is of most practical interest. Legislation on this matter may be viewed from two angles. As conditions of entry and residence, they fall within the scope of Article 267(2); as an element of the residential rights of protection beneficiaries, they fall within the scope of Article 266(2). In their quality as immigration measure those standards should serve the purpose of “efficient management” and “fair treatment” of uniform asylum and subsidiary protection status holders. As asylum measures, they must also serve the “appropriateness” of those statuses, and “be in accordance with” the Refugee Convention and other relevant treaties. In effect, the Constitution calls for higher standards for family reunification measures for protection beneficiaries. The same applies to measures pursuant to Article 267(4), minimum standards on integration.

Solidarity

[244] According to Article 257(2) CFE, the common policy on asylum (as well as the other measures pursuant to Section 2 of Chapter IV) shall be “based on solidarity between Member States”. Article 268 elaborates the issue as follows:

“[t]he policies of the Union set out in this Section and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Section shall contain appropriate measures to give effect to this principle.”

The provision in fact sets an additional standard for all Union asylum legislation and its implementation: compliance with “the principle of solidarity and fair sharing of responsibility [...] between the Member States”. If only “solidarity” would have been required, the provision would have added little or nothing to the principle of loyal co-operation laid down in Article 5(2) CFE (cf. Article 10 TEC, see number [56]). But the combination with the principle of “fair sharing of responsibility” gives the solidarity requirement substance. The absence of controls on internal borders, the control of external borders, but apparently also the offering of “appropriate status” to persons entitled to international protection and the ensuring of the principle of non-*refoulement* (cf. Article 266(1) CFE), are viewed as a shared responsibility. The solidarity and fair sharing hence serve not merely to alleviate unduly heavily burdened Member States, but also to answer a collective responsibility towards persons entitled to protection. Giving effect to this principle is not a noncommittal purpose, but a requirement according to the last clause of the provision.

3.8.6 The Protocols on the United Kingdom and Ireland and on Denmark

[245] Attached to the Constitution for Europe are successor Protocols on the position of the United Kingdom and Ireland and on the position of Denmark.¹¹⁸ The position of the United Kingdom and Ireland as to Union asylum measures is the same as it is as regards Community asylum measures. Thus, measures pursuant to Section 2 and 3 of Chapter IV do not bind these Member States,¹¹⁹ unless they “opt in” which they may do under the same conditions as under the current Protocol.¹²⁰

As to Denmark, Articles 1 to 8 of its Protocol contain an arrangement similar to the one under the present Treaty. Thus, Chapter IV measures do not bind Denmark,¹²¹ and it cannot opt-in to them. As to the future, Denmark may unilaterally revoke the content of this arrangement; then, all adopted measures will apply in Denmark.¹²² The Protocol attached to the present Treaty on European Community provides for the same option. But in the preamble of the new Danish protocol, the “intention of Denmark to avail itself of this option when possible in accordance with its constitutional requirements” is welcomed.¹²³ But according to Article 9 of the new Protocol, Denmark may also “notify” the other Member States that the arrangement laid down in the Annex to the Protocol applies. This Annex provides for an opt-in regime as to Chapter IV measures similar to the one that applies to the United Kingdom and Ireland. Thus, after this notification Chapter IV measures would not bind Denmark, unless it decided to take part in the adoption, or, after it has been adopted, it decides to apply it.¹²⁴ Hence, under its future Protocol, Denmark will have the choice of three options: continuation of its present position, the opt-in regime applying to the United Kingdom and Ireland, or full participation in asylum and immigration matters on the same footing as the other Member States.

3.8.7 Concluding remarks

[246] The Constitution approaches international protection in a more ambitious and comprehensive way than Title IV TEC does. It calls for a “common policy” on international protection, and a “Common European Asylum System”. Concern for the rights and interests of those in need of international protection figure more prominently as the main objectives of both policy and legislation on international protection. Whereas Community powers on inter-

national protection are confined to the issues listed in Article 63 TEC, the Union will have power to issue legislation on any matter that serves the purpose defined in Article 266 CfE. Further, Chapter IV CfE calls for a high degree of harmonisation on several issues – “uniform” asylum and subsidiary protection statuses, and “common” procedures for the grant and withdrawal of uniform asylum or subsidiary protection status.

As to the content of the legislation on international protection (the layout of the common European asylum system), subsidiary protection has a central position next to asylum (refugee protection). The Constitution confines subsidiary protection to aliens not eligible for refugee protection, and temporary protection to mass influxes. This puts a check on a hollowing-out of refugee protection by both alternative statuses. Incidentally, this central position of subsidiary protection is not traceable to the Tampere Conclusions, and even less to Title IV TEC; it rather reflects relevant rules in the Qualification Directive (see paragraph 5.8).

The issues on which the Union should provide legislation differ little from the issues listed in Article 63 TEC. New are the co-operation with third countries, and the power to conclude readmission agreements. The provision on burden sharing (Article 268 CfE) has a predecessor in Article 63(2)(b) TEC, but it is broader in scope and far less non-committal.

[247] Which consequences would the Constitution have for the position of aliens in need of protection? The Convention assigns a central position to protection of their rights for both Union policy and Union legislation on international protection, as we saw, and the insertion of the Charter of Fundamental Rights in the Convention will only reinforce this. Most of the other above-mentioned features are also likely to have the effect of strengthening the position of those in need of protection. However, both new competencies, perhaps, provide for important exceptions. Partnership and co-operation with third countries to manage “inflows” of applicants for protection may ultimately undermine reception of persons in need for protection in Europe, and the competence to conclude readmission agreements may result in a major obstacle to durable protection in Europe.

Finally, as to the envisaged degree of unity of asylum law and policy, total harmonisation is excluded on some, and unlikely on the remaining issues, we saw above. It follows from the peculiar delimitation of the personal scope that Member States will remain competent to grant international protection to aliens outside the scope of beneficiaries defined by the Common European Asylum system. We should further observe that the Constitution still speaks of

the determination of “which Member State is responsible for considering an asylum or subsidiary protection” (Article 266(2)(e)). Hence, determination of eligibility for asylum or subsidiary protection is still conceived as a matter for the Member States, not for some Union institution. Still, all changes in comparison to Title IV TEC point in the same direction: further harmonisation.

It is doubtful, however, whether such further harmonisation will indeed occur in the short term after the entry into force of the Constitution for Europe. For in contrast to Title IV TEC, Chapter IV of the Constitution does not set a time limit for adoption of the measures it calls for.

NOTES

- ¹ The language employed by the relevant Treaty provisions is somewhat inconsistent. Article 2 TEC speaks of the “task” of the Community, referred to by Article 3 as “purposes”. Articles 2 and 29 TEU speak of “objectives”. Article 61 TEC relates the measures mentioned under points (a) to (e) by the vague phrase “in order to”. The Dutch language version somewhat more specifically speaks of “met het oog op”, i.e. “with a view to”. It seems that all these phrasings define “objectives” as meant in Article 5 TEC.
- ² It may be a surprise that the objective is laid down in the Treaty on European Union rather than in the Treaty on European Community. The Treaty of Amsterdam, which introduced the concept, placed it in the former Treaty, as the objective is to be achieved not solely by Title IV TEC measures, but also by those set out in Title VI TEU – the “third pillar” of the European Union (cf. number [45]). Article 2 TEU applies to Title IV TEC by virtue of Article 5 TEU, that states that the Community institutions must (*inter alia*) exercise their powers conferred in the Treaty on European Community for the purposes set out in the Treaty on European Union. Cf. Article 61(a) TEC, that requires measures aimed at securing the freedom of movement in accordance with the TEC provision on the basis of Article 31 TEU.
- ³ This central position of the freedom of movement of persons is further underlined by the Preamble to the Treaty on European Union: “[The Member States,] *RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty*” (Preamble TEU, 11th recital), and by the heading of Title IV, which speaks of “Visa, asylum, immigration and other policies related to the freedom of movement of persons”.
- ⁴ Cf. Article 2 TEC: “*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States*”.
- ⁵ Article 3(1)(c) and (d) TEC.
- ⁶ The strong link between asylum and immigration measures on the one hand and the creation of the freedom of movement of persons as required by Article 14 TEC on the other was underlined by the Court of Justice in the *Wijsenbeek* judgement. The Court stated that the obligation of Member States to abolish border controls pursuant to Article 14(2) “*pre-supposes harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the*

exchange of information on those questions” – that is, implementation of Title IV (ECJ 21 September 1999, C-378/97, [1999] ECR, p. I-6207 (*Wijzenbeek*), par. 40).

- ⁷ Article 61(c) speaks of “*measures in the field of judicial co-operation in civil matters [...]*”, Article 61(e) of “*measures in the field of police and judicial co-operation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union*” – subject-matter addressed in Articles 65 TEC and 31 TEU.
- ⁸ The Dutch language version “*rechtvaardigheid*”, though, appears to connote somewhat more strongly with equity. Cf. Barents 1999, p. 319.
- ⁹ Cf. number [253].
- ¹⁰ See footnote 3.
- ¹¹ Article 29 TEU: “[...] *the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice [...]*”. The term ‘citizens’ refers to nationals of the Member States, cf. Articles 17 TEC and 2, third indent TEU.
- ¹² Boeles 2001, pp. 6-8 argues that “security” also encompasses security or safety from persecution, the major argument being the interpretation of the term “security” in Article 11(1) TEU. Though attractive, this reading must be rejected. Article 11(1) TEU addresses the “common foreign and security policy”. Here, the term “security” is very much connected to defence rather than to asylum, and there is no ground for transferring one aspect of this notion to the entirely different “area of freedom security and justice”. Finally, Article 11(1) does not alter the personal scope of the term “security” where this “area” is concerned. In the same sense see Twomey 1999, p. 371 and Hailbronner 1998, p. 1052.
- ¹³ For Article 63(1) addresses “asylum”, Article 63(2) and (3) “immigration” (as to Article 63(2), this follows from Article 61(a), and cf. number [181] below), and Article 63(4) obviously concerns the freedom of movement. Article 63(4) addresses “measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States”. That measures based on it are labelled as “other measures” by Article 61(b) does not mean they cannot serve the objective of establishing the freedom of movement. Rather, it is merely an “indirectly related flanking measure”.
- ¹⁴ Article 6(1) TEU. A. Vitorino, the Commissioner responsible for the drafting of all Commission proposals on asylum addressed in this book, even asserts that “the protection of fundamental rights is the very foundation of the area of freedom, security and justice” (Exeter Paper 2000/4, <http://www.ex.ac.uk/law/cels/publications.html>).
- ¹⁵ See Hailbronner 2000, pp. 68-69.
- ¹⁶ In the Dutch language version, Article 61 first clause runs as follows: “*Met het oog op de geleidelijke totstandbrenging van een ruimte van vrijheid, veiligheid en rechtvaardigheid neemt de Raad de volgende maatregelen aan: (a) [...] maatregelen [...]*”- “*In order to establish progressively an area of freedom, security and justice, the Council shall adopt the following measures: (a) [...] measures [...; my emphasis]*” and hence reinforces this interpretation.

- ¹⁷ Hailbronner 2000, p. 36.
- ¹⁸ Hailbronner 2000, p. 68 provides for an elegant explanation: Article 62(1) falls within the scope of Article 61(a) but is not mentioned there, as Article 62(2) and (3) sufficiently provide for flanking measures. Though most convincing, the point remains that the relationship should rather have been expressed explicitly.
- ¹⁹ In par. 3.3.4, it will be argued that Article 63(2)(a) indeed addresses both refugees as well as displaced persons.
- ²⁰ Cf. number [65] above. According to Article 67(2), the Council may decide by unanimity voting to apply the Article 251 TEC legislation procedure to measures based on Article 63(3)(a), but hitherto it has not done so.
- ²¹ Compare also Article 18 of the Charter (Article 78 CfE), par. 2.3.5 above.
- ²² See Chapter 6.4.5.
- ²³ See Chapter 4.7.
- ²⁴ See Chapter 4.7.
- ²⁵ Article 63(1)(b) and (d) speak of reception and procedures “in Member States”, and 63(1)(a) of applications submitted “in one of the Member States”.
- ²⁶ See on the ambiguous use of the term “status” under number [190].
- ²⁷ Cf. Article 3(3) DC: “[*The application for asylum*] shall be examined by that State in accordance with its national laws [...]”.
- ²⁸ The Oxford English Dictionary defines “reception” as : “1. *The action or fact of receiving or getting*”; “2.b *The action of receiving (esp. persons), or fact of being received, into a place, company, state, etc.*”
- ²⁹ Hailbronner 2000, pp.79-80.
- ³⁰ Cf. Article 63(1)(d), that speaks of “granting and withdrawing refugee status”.
- ³¹ Hailbronner 2000, p. 80.
- ³² Cf. Preamble recitals (22), (23) and (24) PD.
- ³³ Oxford English Dictionary: “Procedure”, under “1.c. (legal).”
- ³⁴ Incidentally, Article 63(1)(a) provides explicitly for a legal basis for rules on the application of the exception of the safe third country among Member States (see paragraph 7.1 below). But it does not follow that Article 63(1)(d) cannot address the safe third country exception, as Article 63(1)(a) and (d) define different levels of harmonisation.
- ³⁵ See Goodwin-Gill 1998, pp. 9f.
- ³⁶ See Goodwin-Gill 1998, p. 12 with references to relevant documents.
- ³⁷ See Noll & Vedsted-Hansen 1999, pp. 212-215.
- ³⁸ Noll & Vedsted-Hansen 1999, p. 214. Indeed reading protection *to displaced persons* and *for persons* who need protection otherwise appears less plausible than measures *on temporary protection* and *for persons* who are otherwise in need of international protection.
- ³⁹ The term is thus employed in Articles 1 and 8 of the Statute of the UNHCR (UNGA resolution 428(V) of 1950), see “UNHCR’s Observations on the European Commission’s pro-

posal for a Council Directive on minimum standards for qualification [...]", http://www.ecre.org/eu_developments/status/unqual.doc.

- ⁴⁰ There is no reason to assume it "implies a limitation of the scope of the instrument to protection pursuant to an international law basis" as I erroneously stated in Battjes 2002, p. 169.
- ⁴¹ On burden sharing see e.g. Noll 2000 *passim*, Hailbronner 2000, pp. 417-425 and Bouteillet-Pacquet 2001, pp. 261f.
- ⁴² Council Decision of 28 September 2000 establishing a European Refugee Fund, OJ [2000] L252/12; Council Decision of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010, OJ [2004] L382/52.
- ⁴³ Hailbronner 2000, pp. 81-83.
- ⁴⁴ This holds true also for the German "Zustrom", the French "afflux" and the Dutch "toevloed".
- ⁴⁵ Hailbronner 2000, p. 82.
- ⁴⁶ See Craig & De Búrca 2003, p. 129f.
- ⁴⁷ Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, OJ [2001] L93/40.
- ⁴⁸ COM(2003)291 final, p. 21.
- ⁴⁹ A Proposal for a Council Decision on the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national and Council Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention is pending before the European Parliament (situation as of 30 March 2005, <http://www2.europarl.eu.int/oeil/file.jsp?id=5201542>).
- ⁵⁰ On 26 October 2004, the Council signed the Agreement between the European Community and Switzerland concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (cf. Council doc. 13049/04). A Proposal for a Council Decision on the signature, on behalf of the European Community, of this agreement is pending before the European Parliament (situation as of 30 March 2005, cf. <http://www2.europarl.eu.int/oeil/>, CNS/2004/0200).
- ⁵¹ Many commentators (Hailbronner 2000, pp. 96f; Guild and Peers 1999, p. 278) approach the provision from the specific angle of Article 68(2), which limits the jurisdiction of the Court of Justice on measures pursuant to Article 62(1) (see below in the main text). The intricate questions that the latter provision raises should not obscure that Article 64(1) explicitly applies to the whole of Title IV; Article 64(2) confirms this (cf. number [205]). Article 64(1) is the successor to Article K.2(2) ToM that addressed the policy area of asylum ("This Title

shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”), not to Article 100c(5) TEC(old) on the determination of third countries whose nationals should be in possession of a visa (“*This Article shall be without prejudice to the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and the safeguarding of internal security*”; cf. Hailbronner 2000, p. 96).

⁵² Hailbronner 2000, pp. 96-103.

⁵³ ECJ 9 July 1987, Joined cases C-281, 283, 284, 285 and 287/85, [1987] *ECR*, p. 3203 (*Germany v. Commission*), pars. 20f.

⁵⁴ Hailbronner 2000, p. 100 in fact appears to draw the same conclusion from the judgement mentioned in the previous footnote, but suggests that the distinction will apply where the Treaty establishes a special regime for third country nationals, as Title IV does. Arguably, the judgement offers no grounds for this assumption.

⁵⁵ Hailbronner 2000, pp. 99-101.

⁵⁶ Article 14 refers to Article 95, but this provision does not apply to freedom of movement of persons (cf. Article 95(2) TEC). Different from Article 95, Article 94 requires unanimity for adoption of measures.

⁵⁷ The “common market” is mentioned in Article 2 TEC (quoted in footnote 4 above), but not defined by the Treaty. The common market shows considerable overlap with, but is not identical to the internal market (Hailbronner 2000, p. 112).

⁵⁸ ECJ 28 March 1996, Opinion 2/94, [1996] *ECR*, p. I-01759 (*Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*), par. 30.

⁵⁹ Hailbronner 2000, p. 120.

⁶⁰ See on the relation between “positive” and “negative” integration Slot 1996, pp. 380-382.

⁶¹ Slot 1996, pp. 382f and others further distinguish “optional” and “partial” harmonisation. As they play only a very limited role in European asylum law, I will not discuss them.

⁶² ECJ 19 March 1993, Opinion 2/91, [1993] *ECR*, p. I-1061, par. 18; ECJ 12 November 1996, C-84/94, [1996] *ECR*, p. I-5755 (*United Kingdom v. Council*), par. 17: “*In conferring on the Council power to lay down minimum requirements, Article 118a [now 137, HB] does not prejudge the extent of the action which that institution may consider necessary in order to carry out the task which the provision in question expressly assigns to it namely, to work in favour of improved conditions, as regards the health and safety of workers, while maintaining the improvements made. The significance of the expression “minimum requirements” in Article 118a is simply, as indeed Article 118a(3) confirms, that the provision authorises Member States to adopt more stringent measures than those which form the subject-matter of Community action*”; ECJ 17 December 1998, C-2/97, [1998] *ECR*, p. I-8597 (*Società italiana petroli SpA v. Borsana Srl*), par. 35.

⁶³ Dougan 2000, pp. 857-859.

- ⁶⁴ Kurcz 2001, p. 297.
- ⁶⁵ Cf. ECJ 14 July 1998, C-389/96, [1998] *ECR*, p. I-4473 (*Aher-Waggon GmbH v. Germany*), par. 5. Freedom of Member States to set more stringent rules may also be stated straightforwardly, e.g. Article 3(1) Council Directive 89/552: “Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this Directive”, cf. ECJ 9 February 1995, C-412/93, [1995] *ECR*, p. I-0179 (*Leclerc v. TFI*), par. 31.
- ⁶⁶ Cf. ECJ 12 November 1996, C-84/94, [1996] *ECR*, p. I-5755 (*United Kingdom v. Council*), par. 17, quoted above in footnote 62; ECJ 17 December 1998, C-2/97, [1998] *ECR*, p. I-8597 (*Società italiana petroli SpA v. Borsana Srl*), par. 35; Opinion A-G Tizzano 8 February 2001, C-173/99, [2001] *ECR*, p. I-04881 (*The Queen v. Secretary of State for Trade and Industry, ex BECTU*), pars. 45 and 46. See also Kurcz 2001, p. 297.
- ⁶⁷ ECJ 17 December 1998, C-2/97, [1998] *ECR*, p. I-8597 (*Società italiana petroli SpA v. Borsana Srl*), pars. 37-38, and Opinion A-G Ruiz-Jarabo Colomer 10 December 2002, C-103/01, [2003] *ECR*, p. I-5369 (*Commission v. Germany*), par. 32.
- ⁶⁸ Article 95(4) and (5) TEC state that the Member States can introduce or maintain domestic deviating from Community legislation aimed at the establishment of the internal market only allowed if they are justified “on grounds of major needs referred to in Article 30” (such as public morality, public policy or public security), and under the control of the Commission.
- ⁶⁹ Opinion A-G Léger 12 March 1996, C-84/94, [1996] *ECR*, p. I-5755 (*United Kingdom v. Council*), par. 75: “Ces mesures, qui peuvent garantir un haut niveau de protection, sont “minimales” en ce seul sens que les États membres gardent la faculté de prévoir des mesures plus protectrices [...]”, and pars. 107 and 130f.
- ⁷⁰ Cf. ECJ 12 November 1996, C-84/94, [1996] *ECR*, p. I-5755 (*United Kingdom v. Council*), par. 57.
- ⁷¹ Cf. Article 228 TEC.
- ⁷² Cf. ECJ 13 May 1997, C-233/94, [1997] *ECR*, p. I-2405 (*Germany v. European Parliament and Council*), par. 43.
- ⁷³ Cf. Hailbronner 2000, p. 419.
- ⁷⁴ It should be recalled that the Court read the requirement of compatibility with the Treaty in Article 137(5) as compatibility with both primary and secondary Community law – see number [213] above. My assumption that the second last clause of Article 63 “implies that, on the point of residence conditions, Member States can adopt or retain national legislation deviating from the Directive to the detriment of the third country nationals concerned”, was therefore incorrect. (Battjes 2002, p. 162).
- ⁷⁵ See paragraph 4.5.
- ⁷⁶ Cf. Hailbronner 2000, p. 381.
- ⁷⁷ This does not necessarily hold true for Directives, that are binding the Member States to

whom they are addressed (cf. Article 249 TEC). However, on this footing no Member State has been exempted from the scope of application of any Directive on asylum.

⁷⁸ I deal only very succinctly with these protocols. For a study in detail, see Hedemann-Robinson 1999.

⁷⁹ Article 2 Protocol on the position of Denmark.

⁸⁰ Article 7 Protocol on the position of Denmark.

⁸¹ Preamble recital (19) DR.

⁸² Article 1 Protocol on the position of the United Kingdom and Ireland. Nor do agreements or ECJ rulings based on Title IV bind those states (Article 2).

⁸³ Article 3(1) Protocol on the position of the United Kingdom and Ireland.

⁸⁴ Article 3(2) Protocol on the position of the United Kingdom and Ireland.

⁸⁵ Article 4 read in conjunction with Article 11(3) of the Protocol on the position of the United Kingdom and Ireland.

⁸⁶ Article 8 of the Protocol on the position of the United Kingdom and Ireland.

⁸⁷ Vermeulen 2002, p. 45; Battjes 2002, p. 69.

⁸⁸ ECJ 19 March 1993, Opinion 2/91, [1993] ECR, p. I-1061 (*Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work*).

⁸⁹ Opinion 2/91, par. 18.

⁹⁰ Explicitly so in the Final Act of the Plenipotentiaries on refugees and Stateless persons under E (“[Expressing] the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides”), Article 5(1) CCPR (*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant*), and Article 53 ECHR (“*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party*”).

⁹¹ Section 3 and 4 address judicial co-operation in civil and criminal matters, and contain the successors to Article 65 TEC and to Articles 30 and 31 TEU.

⁹² Cf. Art. 10(1) CfE: “Every national of a Member State shall be a citizen of the Union”.

⁹³ Article 257(1) CfE. Different from Article 61, the provision does not state explicitly that this indeed is the objective of Chapter IV measures; rather, this follows from reading the provision in conjunction with Article 266, see below.

⁹⁴ Article 2 CfE mentions “respect for human rights” as one of the “values” on which the Union is “founded”, and Part II as we saw is a catalogue of human rights (see paragraph 2.3).

- ⁹⁵ Article 257(2) CfE.
- ⁹⁶ It appears that the term “asylum” in Article 257(2) means “international protection” as defined in Article 266(1), not “asylum” as meant in Article 266(2)(a) – that is, not only Refugee Convention protection but also subsidiary and temporary protection (cf. number [232] below).
- ⁹⁷ The limitation of scope to third country nationals in Article 266(2)(a) and (b) is hence superfluous.
- ⁹⁸ “*A slightly different wording was also adopted for temporary protection [i.e. the replacement of the term uniform by common, HB], given that Union action in this area is mainly a matter of a common system enabling the Union to cope with massive inflows, but not necessarily a uniform status for the persons concerned or a uniform procedure in individual cases*” (CV 727/03 ANNEX III, p. 30). Article 190(4) TEC was amended by the Treaty of Amsterdam to allow for the possibility to establish “common principles” rather than a “uniform procedure” for elections for the European Parliament – the latter standard appeared to be too ambitious (cf. Craig & De Búrca 2003, pp. 76-77).
- ⁹⁹ Tampere Conclusions 14 and 15.
- ¹⁰⁰ Article 12 CfE; cf. Article 5 TEC.
- ¹⁰¹ Article 14(2)(j) CfE.
- ¹⁰² Article 12(2) CfE.
- ¹⁰³ ACVZ 2004, pp. 19-20.
- ¹⁰⁴ Article 11(3) CfE, identical to Article 5(1) TEC.
- ¹⁰⁵ Article 13(2) CfE.
- ¹⁰⁶ Cf. Hailbronner 2000, p. 36, on the “uniform” result application of minimum standards as defined in Article 63 TEC may produce.
- ¹⁰⁷ Obviously, the term “asylum” has a broader meaning in the term “common European asylum system” (Article 266(2) first clause; see number [232]).
- ¹⁰⁸ The Oxford English Dictionary gives for “status”: “2. *a. Law. The legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations*”.
- ¹⁰⁹ It seems the European Council employed the term in this meaning in its Tampere Conclusion 14, when speaking of a “uniform status for those who are granted asylum valid throughout the Union”, that is, defining status as the result of the grant of asylum (cf. number [49]).
- ¹¹⁰ Article 2(d) QD even defines “refugee status” as recognition only (cf. number [575]).
- ¹¹¹ The requirement already figures in Tampere Conclusion 14 (cf. number [49] above), which did not address subsidiary protection status.
- ¹¹² It seems that the Commission interpreted the same phrase in the Tampere Conclusions in the same way, though somewhat tentatively: the “*uniform status valid throughout the Union might entail the possibility of settling in another Member State after a certain number of years or travelling there to pursue study or training*” (COM(2001)755, p. 13).

- ¹¹³ The same holds true for the Dutch “toevloed”, the German “Zustrom” and the French “afflux”.
- ¹¹⁴ Article 35(2) CfE. Article 266(3) CfE does require that the Parliament is “consulted”.
- ¹¹⁵ It appears that it goes back to the Tampere Conclusions, cf. Conv 727/03 Annex III, p. 30.
- ¹¹⁶ Cf. Noll, Fagerlund & Liebaut 2002, Bruin & Teitler 2003.
- ¹¹⁷ Article 257(2) mentions “asylum”, “immigration” and “external border control” as the subject matter of the Chapter. Arguably, “asylum” means here “international protection” as defined in Article 266(1) CfE – just as in Article 266(2) first clause.
- ¹¹⁸ Protocol 19, on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration, judicial co-operation in civil matters and on police co-operation and Protocol 20, on the position of Denmark.
- ¹¹⁹ Article 2 Protocol on the Position of the UK and Ireland.
- ¹²⁰ Cf. Articles 3, 4 and 8 Protocol on the Position of the UK and Ireland.
- ¹²¹ Article 2 Protocol on the Position of Denmark.
- ¹²² Article 8 Protocol on the Position of Denmark.
- ¹²³ Preamble to the Protocol on the Position of Denmark, fourth clause.
- ¹²⁴ Articles 1, 3 and 4 Annex to the Protocol on the Position of Denmark. - There is one difference with the arrangement for the United Kingdom and Ireland: measures building upon the Schengen *acquis* which bound Denmark under international law will bind Denmark as Union law six months after it made the mentioned “notification” (Article 9(2) Protocol on the Position of Denmark).

Chapter 4

The Common European Asylum System

In Chapters 5 to 8, I describe the rules on international protection laid down in secondary European law, and analyse how they relate to international law on asylum. The present Chapter serves as an introduction to that description and analysis. I discuss how the several pieces of legislation that concern asylum relate to each other, and address some topics they have in common, such as the definition of the objectives and aspects of their personal and geographical scopes.

4.1 The concept

[248] In the description and analysis in the present and following Chapters, the Community measures on asylum are not addressed separately but as constituents of a system, of an organised body of law, the “Common European Asylum System” (below also: CEAS). This concept does not appear in the Treaty on European Community. The notion of a “Common European Asylum System” was introduced only in 1999 by the European Council in its Tampere Conclusions as the aim of this legislation.¹ The Community legislator took over this aim: according to the Preambles to the Qualification Directive, the Procedures Directive, the Reception Directive and the Dublin Regulation, these measures are “included” in the Common European Asylum System;² the Temporary Protection Directive refers to the concept where it speaks of “common European arrangements on asylum”.³

Thus, relevant Preamble recitals imply that most instruments addressed here make part of a whole, the Common European Asylum System. A combined analysis is furthermore warranted because these instruments share a number of common definitions or concepts, such as the definition of “applications for asylum” and of the objective. In addition, the discussion of this legislation as a system enables us to see unexpected connections, inconsistencies or gaps. Moreover, the conception of European asylum legislation as an integrated system is in some quite important respects necessary to interpret its rules, including claims on protection relevant for international law.⁴ Finally, description and interpretation of Community asylum legislation as parts of a system is convenient for the assessment of compatibility with international asylum law.

The Dublin Convention and the Family Reunification Directive do not refer to the Common European Asylum System.⁵ They are therefore not “parts” of this system. Because of their relevance for claims under international asylum law I nevertheless include them into the discussion below. But we must bear in mind that these measures were not intended to form a systematic whole with the other measures, and that their terms may have a meaning of their own.

4.2 The lay-out

[249] Article 63 TEC gives some directions for the layout of the CEAS. Points (1) and (2) of Article 63 TEC mention four categories of protection (below: “statuses”): “refugee status”, “temporary protection” for “refugees” and (other) “displaced persons” (below: temporary protection status), “international protection” otherwise (below: subsidiary protection), and protection of “asylum seekers” or “applicants” (below: applicant status).⁶ As to refugee status, it requires rules on qualification and on procedures for the granting or withdrawing of it; as to applicant status, it requires “reception standards” and “criteria and mechanisms” for allocation of applicants. The subject matter of legislation on temporary and subsidiary protection is not defined in Article 63 TEC. Finally, Article 63(3)(a) TEC calls for measures on “family reunification”.

The Tampere Conclusions added one topic to this legislation programme: the “content of refugee status” (i.e. secondary rights for refugees; see number [49]). They further specified that the measures on temporary and subsidiary protection should offer “appropriate status to anyone in need of such protection”, explicitly calling for legislation on secondary rights, and implicitly for rules on qualification for these statuses.

[250] According to their headings, the pieces of European legislation on international protection address all these topics. Thus, the Qualification Directive sets rules on “qualification” as “refugees” and as “persons in need of international protection”, as well as the “content” of the protection granted, the Procedures Directive on “procedures for granting and withdrawing refugee status”, the Reception Standards Directive on “reception” or secondary rights of applicants, the Dublin Regulation on allocation of applicants in the European Union, the Family Reunification Directive on family reunification, stating special rules for such reunification with “refugees”, and the Temporary Protection Directive establishes standards for “temporary protection in the event of a mass influx”.

How do these instruments relate? Because of its subject matter, the Qualification Directive is central to the CEAS – in the terms of the Commission, it is its “heart”.⁷ If so, the Procedures Directive should be considered as the backbone of the system, as it links most of its limbs.

The Procedures Directive addresses procedures for dealing with applications for asylum, i.e. protection under the Refugee Convention; in terms of personal scope, it applies to applicants for refugee protection,⁸ and may apply to applications for subsidiary protection.⁹ It defines the beginning and end of asylum seeker status, and hence conditions entitlement to the benefits set out in the Reception Standards Directive.¹⁰ It further requires examination of applications, except when a limited number of exceptions apply.¹¹ This examination must address whether the application is well-founded – again, except when a limited number of exceptions apply.¹² As far as relevant for present purposes, no examination of whether the claim is well-founded takes place when the Dublin Regulation is applied,¹³ that is, if it turns out another Member State is responsible for examining the claim, or if some other variant of the safe third country exception applies. But if none of these exceptions apply, the Member States must address the merits of the application, and may consider it as “unfounded” only if it is “established that the applicant does not qualify for refugee status pursuant to Council Directive 2004/83”, the Qualification Directive.¹⁴ If it turns out that the applicant qualifies for “refugee status” or “subsidiary protection status” as defined in the Qualification Directive, he is entitled to the benefits attached to this status as set out in the same Directive. Further, the alien whose refugee status has been recognised may invoke relevant rules in the Family Reunification Directive.¹⁵

Hence, the Procedures Directive, the Qualification Directive, the Reception Standards Directive, (part of) the Family Reunification Directive and the Dublin Regulation address several aspects of one asylum system. The Temporary Protection Directive on the other hand establishes a separate regime. It confers the competence to the Council to issue a decision that establishes “temporary protection” in case of a mass influx that defines the scope of beneficiaries.¹⁶ Secondary rights, allocation, family unity and some procedural aspects are all regulated in the Temporary Protection Directive.

[251] If we abstract a little from the specific instruments, the set-up of the Common European Asylum System is as follows (see scheme 1 below). It establishes four “protection statuses”.¹⁷ By “protection status” I mean a category of protection granted to aliens because of a threat of violation of their

human rights in their country of origin. These statuses are the “refugee status”, “subsidiary protection status”, “temporary protection status” and “applicant status” (or “asylum seeker status”). Further, it sets rules on four topics for all or some of these statuses. First, rules on the “qualification” for these statuses that address who is eligible for a certain status and who is not. Secondly, rules on “procedures”, i.e. procedures for granting or withdrawing the protection statuses. Thirdly, rules on “allocation”, determining where a claim for asylum should be examined: by the Member State where it was lodged, by another Member State, or by a non-EU-Member State. Fourthly, rules defining the “secondary rights” to which the beneficiaries of the various statuses are entitled, among them the right to remain (that is, in terms of international asylum law, protection from *refoulement*), and the right to family reunification.

In a scheme, these issues are addressed in the several CEAS instruments as follows:

Scheme 1 - The Common European Asylum System

	<i>refugee status</i>	<i>subsidiary status</i>	<i>temporary status</i>	<i>applicant status</i>
<i>qualification</i>	QD 63(1)(c) TEC	QD 63(2)(a) TEC	TPD 63(2)(a) TEC	PD 63(1)(d) TEC
<i>procedure</i>	PD 63(1)(d) TEC	-	-	TPD 63(2)(a) TEC
<i>allocation</i>	-	-	TPD 63(2)(b) TEC	PD and DR 63(2)(a) and (3)(a) TEC
<i>secondary rights</i>	QD and FRD 63(3)(a) TEC	QD 63(3)(a) TEC	TPD 63(2)(a) TEC	RSD and DR 63(1)(a), (b) TEC

This scheme is, obviously, a simplification. As to the number of statuses, European legislation establishes next to the four “protection statuses” mentioned above a number of other statuses, categories of aliens to whom it bestows certain benefits. The Qualification Directive establishes two more “protection statuses” for refugees in the sense of Article 1 RC, to whom “refugee status” as meant in the Qualification Directive is denied because the

grounds for expulsion in Article 33(2) RC or 32(1) RC apply (see paragraph 8.5). Family members of beneficiaries of all four statuses indicated in the scheme above are entitled to (different sets of) secondary rights, and hence to dependant statuses.¹⁸ Further, the borderlines between the various topics are not as clear-cut as suggested in the scheme. For example, procedural issues are covered not only by the Procedures Directive, but in the Qualification Directive and the Dublin Regulation as well, and the Procedures Directive may apply to applications for subsidiary protection.

But notwithstanding these considerations, the discussion of the Community legislation in the following Chapters is structured along the lines of the set-up of the CEAS as sketched above (see number [271] for the order of discussion). Here, I address some topics common to all measures.

4.3 Legal basis

[252] Scheme 1 shows the provisions of the Treaty on European Community that “in particular” serve as a legal basis for the relevant instrument according to their Preambles.¹⁹ For most rules, the Treaty basis does not raise questions (cf. paragraph 3.3). We may observe that rules on procedures in the Dublin Regulation other than those determining the Member State responsible for processing the asylum claim, find their basis in Article 63(1)(d) (or (3)(a)) TEC, not in Article 63(1)(a) TEC (and are therefore “minimum standards”; see number [187]). Rules on the qualification of a third country as “safe” find their basis in Article 63(3)(a), not 63(1)(d) TEC (cf. number [191]). Further, the legal basis of Procedures Directive rules as far as they address the granting of subsidiary protection status (see par. 4.7) is Article 63(2)(a) TEC (see number [196]), although the Procedures Directive does not state so. Finally, rules on the “reception standards” of family members of applicants can only be based on Article 63(3)(a), not on Article 63(1)(b) TEC.

4.4 Objectives

[253] The Directives on Qualification, Procedures, Reception Standards, Temporary Protection and Family Reunification all explicitly define as their “purposes” (or “main objectives”) laying down standards on the subject matter they address.²⁰ All measures further serve the aim of “the progressive establishment of an area of freedom security and justice”²¹ – the objective of all

Title IV measures, laid down in Article 61 TEC. In paragraph 3.2, we saw that this objective includes establishing the freedom of movement of Union citizens, security, and respect for fundamental rights of third country nationals. The instruments all make clear in what respects they serve to establish these aims.

The Qualification, Procedures, Reception Standards and Temporary Protection Directives as well as the Dublin Regulation all serve “to limit secondary movements” of applicants (or temporary protection beneficiaries).²² In this respect, they are flanking measures aimed at ensuring the freedom of movement. The Family Reunification Directive does not likewise refer to the freedom of movement; its Preamble observes that family reunification

“helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty.”²³

A number of provisions in various instruments seem to serve the objective of securing the “security”.²⁴

[254] As to the other aspect of the “area”, securing respect for the rights of third country nationals, all relevant instruments observe that the “common European asylum system” is part of the objective of creating the “area of freedom, security and justice open to those who legitimately seek protection in the Community”.²⁵ The latter phrase is the interpretation of the objective set in Article 61 TEC by the European Council in its Tampere Conclusions (see number [49]). The Family Reunification Directive states that the objective of creating this “area” includes “the safeguarding of rights of third country nationals” (mentioned in Article 61(b) TEC, see number [175]).²⁶

The link between “legitimately seeking protection in the Community” and observation of obligations under international asylum law is elaborated only partially. The Family Reunification Directive “respects the fundamental rights and observes the principles recognised in particular in Article 8 [ECHR]”.²⁷ The Temporary Protection Directive states that

“temporary protection should be compatible with the Member States’ international obligations as regards refugees”,

but continues that

“[i]n particular, it must not prejudice the recognition of refugee status pursuant to the [Refugee Convention]”.²⁸

Respect for international asylum law is stated in even more abstract terms in the other CEAS instruments. They observe that

“Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.”²⁹

These obligations are therefore not set as a standard for interpretation or application of those instruments. It is further observed that

“The European Council at its special meeting in Tampere [...] agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the [Refugee Convention], thus affirming the principle of non-*refoulement* and ensuring that nobody is sent back to persecution”.³⁰

But in how far the present legislation aims at securing this “full and inclusive application” and “the principle of non-*refoulement*” is not commented on. Remarkably, none of the CEAS instruments does explicitly refer to any of the prohibitions of *refoulement* laid down in other instruments than the Refugee Convention. Even the Qualification Directive, whose provisions on subsidiary protection quite clearly address especially the prohibition on exposure to ill treatment ex Article 3 ECHR (see number [275]), speaks in a general kind of way of “international obligations under human rights instruments”.³¹

Less reserved are the various pieces of asylum legislation on the Charter of Fundamental Rights of the European Union. With the exception of the Temporary Protection Directive, they all “respect” this Charter; “in particular”, the Qualification and Reception Standards Directives “seek to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members”, or Articles 1 and 18 Charter.³² The Dublin Regulation also seeks to ensure respect for the right to asylum. The prohibition of *refoulement* of Article 19 Charter is left unmentioned in all European asylum legislation.

[255] In summary, apart from the Family Reunification Directive, all instruments under discussion serve to preclude secondary movements. Ensuring respect for (fundamental) rights of third country nationals is also a shared objective. Only the Family Reunification Directive unambiguously serves to secure respect for international obligations concerning refugees. The other instruments all refer to the Refugee Convention, but do not “respect” the rights recognised in the instrument, and do not even mention the other relevant instruments of international asylum law. In contrast, “respect” for the Charter is explicitly stated in all instruments but the Temporary Protection Directive.

The objectives of the Directives on Qualification, Procedures and Reception Standards Directives and of the Dublin Regulation are largely couched in iden-

tical or similar terms. The common references to the Tampere Conclusions on the establishing of a Common European Asylum System and the common definitions of their objectives contribute to the unity of that system.

4.5 Minimum standards

[256] Pursuant to Article 63 TEC, except for the rules on “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum”, all CEAS legislation sets “minimum standards”.³³ We saw that this “minimum standard” character entails that the relevant legislation must be observed by the Member States, but allows them to adopt or maintain domestic standards that are more favourable for the beneficiary of the Community legislation, if two conditions are met. First, the domestic measure should not undermine the coherence of Community action and second, they should be in conformity with the Treaty (see number [213]). It would seem that the Member States could always deviate from Community law standards in order to comply with their obligations under international law – or do the these conditions set restraints?

[257] Above, we saw that the secondary law on asylum serves two objectives: safeguarding rights of third country nationals, and precluding secondary movements. Obviously, domestic standards that serve to secure observance of international asylum law do not undermine Community action on the safeguarding of those rights – they rather reinforce it. As to the other objective, one could argue that a Member State that states more favourable domestic rules than the minimum standards in Community law may cause secondary movements, and therefore undermine the coherence of Community action. However, there are two objections to make to this reasoning.

First, as far as it serves the objective of precluding secondary movements, the Community law on asylum is a flanking measure aimed at securing the freedom of movement of Union citizens. That is, the Community law is to prevent unwanted inflow of applicants to Member States due to disharmony of asylum law. By raising protection standards above the minimum level prescribed by European asylum law a Member State may attract applicants from other Member States. But doing so would not in itself adversely affect the freedom of movement. Inflow into a Member State due to higher domestic standards than those that apply in the other Member States would not be among the secondary movements the Community law

seeks to prevent, and could therefore not undermine the unity of Community action in this respect.

Second, the objective of preventing secondary movements does not detract from the other objective, safeguarding of rights of third country nationals. Thus, where Community law serves to counter disharmony in asylum law that causes secondary movements, it endeavours to do so while safeguarding the rights of third country nationals. Domestic standards that comply with international law standards do not undermine the coherence of Community action, thus defined. Rather, domestic law of Member States that complies with low minimum standards set by Community law but is not up to international law causes secondary movements, and undermines the unity of Community action in that respect. It follows that if and to whatever extent domestic law that deviates from minimum standards secures observance of the Member State's obligations under international law, it cannot undermine the unity of Community action. Arguably, the second last clause of Article 63 TEC states that much where it allows for national provisions that deviate from measures adopted pursuant to Article 63(3) or (4) TEC, if those provisions are "compatible with the treaty and international agreements" (see number [130]).

[258] As to the condition that the domestic standard should comply with superior Community law, it was observed that only the relevant Treaty provisions and general principles address respect for or accordance with relevant international law standards (see number [217]). Domestic law that respects or is in accordance with international law hence complies with this condition.

In summary, neither condition restrains the competence of Member States to adopt more favourable domestic law, at least not if that law serves to secure performance under international law. For practical purposes, minimum standards on asylum allow for deviating domestic law that sets more favourable standards of treatment of the beneficiaries of the minimum standards in accordance with international asylum law.

[259] How do the Directives that set minimum standards convey this Member State competence to set deviating standards? The Directives on Temporary Protection and on Family Reunification both state in accordance with the definition above that

"This Directive shall not affect the prerogative of the Member States to adopt or retain more favourable conditions".³⁴

The Directives on Qualification, Procedures and on Reception Standards all observe that

“Member States may introduce or retain more favourable standards [on the subject-matter concerned], in so far as those standards are compatible with this Directive”.³⁵

Arguably, the last part of this clause renders the requirement that relevant national standards should not undermine the coherence of the Community policy that those standards serve. But the Preambles to the Directives on Qualification, Procedures and on Reception Standards all observe that

“[i]t is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State”.³⁶

It follows that standards that are more favourable for applicants, refugee or subsidiary status beneficiaries should not be seen as threats to the unity of Community action. Thus, all directives on asylum allow for domestic law that exceeds their standards in order to comply with obligations under international law.

4.6 Harmonisation

[260] A different matter is the degree of harmonisation envisaged by the pieces of legislation addressed here (cf. number [214]). The relevant legislation implies two levels of ambition. First, the Qualification and Family Reunification Directives aim at “*common* criteria” (emphasis added), both “for the identification of persons genuinely in need of international protection” as well as on “the material conditions for exercising the right to family reunification”.³⁷ It follows from the term “common” that a relatively high degree of harmonisation on these matters is intended (cf. number [230]).

Second, the Qualification Directive aims at ensuring that merely “a minimum level of benefits is available for [persons genuinely in need of international protection]”.³⁸ The Procedures Directive aims at introducing no more than “a minimum framework [...] on procedures”.³⁹ And the Receptions Standards Directive intends to set “minimum standards for the reception of asylum seekers that will *normally* suffice to ensure them a dignified standard of living” (emphasis added, HB), which objective emphasises the minimum standard character: European standards may occasionally allow for an undignified standard of living.⁴⁰ On these matters, a relatively modest level of harmonisation is envisaged. The Dublin Regulation and the Temporary Protection Directive do not define a particular level of harmonisation.

The envisaged level of harmonisation is relevant for determining the material scope of the legislation, and henceforth for the scope of review of the European Court of Justice (see paragraph 2.2.2.3). This scope of review will be addressed after having discussed the relevant legislation in some detail (in paragraph 9.3.3).

4.7 Personal scope

Non-EU citizens

[261] The Common European Asylum System is restricted *ratione personae* to third country nationals and stateless persons, i.e. to persons who do not possess the nationality of one of the Member States of the European Union.⁴¹ The distinction between third country nationals and stateless persons has no consequences as far as application of European asylum law is concerned. For brevity's sake, I refer below to both "third-country nationals" as well as "stateless persons", as third country nationals or non-EU citizens. The legal bases of these measures in Article 63 TEC all state or imply this restriction to non-EU citizens (cf. number [184] above). For EU citizens, the Spanish Protocol establishes a separate legal regime (cf. paragraph 6.4.6).

Is the distinction between nationals and non-nationals of the EU at variance with the various prohibitions of discrimination that may apply?⁴² I don't think so, for the distinction does not necessarily lead to unequal treatment on the national level, i.e. in the application. This might be different if Member States set up special regimes for asylum for EU-citizens, justifying the distinction by European legislation. But then the discrimination would follow from those national systems, not from the Treaty on European Community or European legislation itself.

The personal scope of provisions on refugee, subsidiary protection and temporary protection status is further defined by the definitions of "refugee", "subsidiary protection beneficiary" and "persons enjoying temporary protection", laid down in the Qualification and the Temporary Protection Directives. These will be extensively discussed in chapter 5. Here, the definition of the "applicant" must be addressed, in view of its consequences for the relation between the several instruments.

Applicants

[262] The Procedures Directive, Residence Standards Directive and Dublin

Regulation all apply to “applicants” or “asylum seekers”: third-country nationals who made an “application for asylum in respect of which no final decision has yet been taken”.⁴³ The term “application for asylum” is defined in the Procedures Directive, Residence Standards Directive and Dublin Regulation as

“the application made by a third-country national which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless a third-country national explicitly requests another kind of protection that can be applied for separately”.⁴⁴

Hence, an application for “international protection” is an “application for asylum”, unless the Member State runs a “separate procedure” for another kind of protection, *and* the applicant explicitly requested for that other kind of protection.

The term “international protection” is not defined in the Dublin Regulation, the Procedures Directive or the Reception Standards Directive. The Qualification Directive defines “international protection” as

“the refugee and subsidiary protection status as defined in [the Qualification Directive].”⁴⁵

It is unlikely that the term “application for international protection” as employed in the other instruments implies a restriction to only refugee or subsidiary protection. In Article 63(2)(a) TEC, the term covers any form of protection for third country-nationals, including refugees who enjoy “asylum” and temporary protection beneficiaries (cf. number [195]). It appears that the Procedures Directive employs “international protection” in the same sense. Article 3(3) PD states that the instrument must, certain conditions being fulfilled, apply to requests for subsidiary protection (see the next number); Article 3(4) PD states that

“Moreover, Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection.”

So for the purposes of the Procedures Directive, “international protection” may encompass next to protection under the Refugee Convention (necessarily implied by “applications for asylum”), and subsidiary protection as defined by the Qualification Directive, other kinds of protection also.

[263] Consequently, an application for any kind of protection that domestic law may provide is an “application for international protection”, and therefore an “application for asylum” for the purposes of the Dublin Regulation, the

Reception Standards Directive and the Procedures Directive. We saw above that these instruments apply to applications for all those forms of international protection, unless Member States run a separate procedure for another kind of protection than refugee protection, and the third country national requests it. It follows that the personal scope of application of CEAS rules on “applicants” differs among the Member States, depending on the set-up of their domestic asylum procedures. For it follows that if eligibility for refugee protection is examined in combination with eligibility for other forms of international protection, persons applying for such other forms *must* be treated as “applicants” for the purposes of the Dublin Regulation, Procedures Directive and Residence Standards Directive.⁴⁶ The Procedures Directive confirms this for applicants for subsidiary protection:

“[w]here Member States employ or introduce a procedure in which asylum applications are examined both as applications on the basis of the Geneva Convention, and as applications for other kinds of protection as defined by Article 15 of [the Qualification Directive], they shall apply this Directive throughout their procedure”.⁴⁷

If the examination is *not* combined in one procedure, the Member States *may* nevertheless apply the Procedures Directive and the Residence Standards Directive standards to those “separate” procedures as well – procedures for the granting of subsidiary protection as well as for other forms of “international protection”.⁴⁸ Applicants will in the first instance not explicitly apply for other forms of protection than refugee protection.⁴⁸ In fact, therefore, those “separate” procedures are “subsequent” procedures that apply after it has been established that the applicant does not qualify for refugee status.⁴⁸

The Dublin Regulation does not provide for an extension of its personal scope for states running separate procedures for other forms of international protection. In those states, a third country national may therefore evade application of the instrument by explicitly requesting a form of protection processed separately.

[264] In summary, the Dublin Regulation, the Procedures Directive and the Residence Standards Directive apply to third-country nationals who apply for refugee protection, but not necessarily to persons who apply for subsidiary protection. If a Member State runs a separate procedure for qualification for subsidiary protection, and has not extended the scope of application of the Procedures and the Reception Standards Directive to this separate procedure, applicants for subsidiary protection fall out of their scopes. Meanwhile, they are entitled to the guarantees applying to “applicants for subsidiary protec-

tion” laid down in the Qualification Directive, as this instrument defines the “application” as

“a request [by a third country national] for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately”.⁵¹

Hence, an alien is an “applicant” for the purposes of the Qualification Directive if he applies (or can be understood to apply) for subsidiary protection, regardless whether the Member State concerned runs a “separate procedure” for the processing of such claims or not.

The definition of “applicants for asylum” hence allows for diverging personal scopes in the Member States. This is regrettable for more than one reason. Such disharmony may cause secondary movements, whereas precluding them is one of the objectives of the CEAS legislation. As persons eligible for subsidiary protection may fall within the scope of international asylum law, the absence of rules on (especially) procedures means a gap in their protection, whereas safeguarding their rights is also one of the objectives of the asylum legislation. And from the point of view of the CEAS, the divergence of the personal scopes of especially the Procedures and the Qualification Directives poses a number of problems, as we will see below.

4.8 Territorial scope

[265] As to the territorial scope, the relevant legislation does not apply to all Member States. By virtue of the protocol on the Position of Denmark, none of the Community legislation discussed here applies to this state;⁵² only the Dublin Convention (and its successor) applies to Denmark (see number [219]).

By virtue of the Protocol on the Position of the United Kingdom and Ireland, these Member States can decide not to partake in any instrument adopted pursuant to Article 63 TEC (cf. number [220]). Ireland decided not to partake in the Temporary Protection Directive and the Reception Standards Directive;⁵³ both the United Kingdom and Ireland do not partake in the Family Reunification Directive.⁵⁴ The Qualification and Procedures Directives as well as the Dublin and the Dublin Application Regulations all apply to both states.⁵⁵

As the Dublin Application Regulation “applies” to Norway and Iceland by virtue of an Agreement with these states, for the purposes of that Regulation

the term “Member States” includes both non-Member States.⁵⁶ When I speak below of “the Member States”, the states bound by the relevant piece of legislation are to be understood.

[266] The territorial scope of the asylum legislation has yet another aspect: do the instruments apply only to acts performed by the (bound) Member States on the territory of the Member States, or also to acts committed outside the borders? The Procedures Directive, Dublin Regulation and Reception Standards Directive apply to third country nationals who applied for asylum at the borders of or within the Member States.⁵⁷ Both Directives specify that they do not apply to applications lodged at representations abroad.⁵⁸ This does not preclude that the relevant rules (continue to) apply if the third country national left the Member State, or even the European Union, once the application has been made there.⁵⁹ The restriction to applications that are made at the borders of or within the territories of the Member States follows from the Treaty bases of these instruments.⁶⁰

The Temporary Protection Directive does not restrict its scope of application to third country nationals within the Member States, though such a restriction may in practice follow from the Council decision installing this protection.⁶¹ Several provisions imply obligations towards persons still outside the European Union.⁶² The Treaty basis of this instrument does indeed not imply a restriction to persons within the Union (cf. number [197]).

The Family Reunification Directive addresses the issue of residence permits to family members of third country nationals (“sponsors”) who are holders of a residence permit.⁶³ Obviously, the family members whose entry is requested need not to be present in the Member States, but the same may be true for the sponsor.

[267] Remarkably, the Qualification Directive is silent on its territorial scope of application. Its Treaty basis (Article 63(1)(c) and (2)(a) TEC) allows for application on the territory of the Member States as well as abroad (number [185]). Can we assume that obligations, such as the duty to “grant” refugee status or subsidiary protection status “to a third country national or stateless person” who qualifies for it,⁶⁴ apply to any non-EU citizen, no matter where he lodged his request?

It is hardly likely that the Community legislator intended such far-reaching implications. It appears from the Preamble to the Qualification Directive that its purpose is approximation (or harmonisation) of existing obligations under international law or current practices, not extension of the scope of Member

States' obligations as to protection.⁶⁵ Thus, the criteria on qualification for refugee status concern specifically Article 1 RC, and those for subsidiary protection "should be drawn from international obligations under human rights instruments and practices existing in Member States".⁶⁶ The Refugee Convention does not impose obligations as regards refugees on foreign soil;⁶⁷ the same holds true for the prohibitions of *refoulement* ex Articles 3 CAT and 7 CCPR.⁶⁸ Several authors have argued that the Member States may incur responsibility under Article 3 ECHR in case of refusal to offer protection requested abroad. But it appears from a study by Noll, Faegerlund and Liebaut that few Member States operate regimes for extraterritorial processing of applications.⁶⁹ There is no reason to assume that the Qualification Directive serves to harmonise the disparate domestic legislation on this matter. Nor do "practices existing in Member States" give reason to assume that the Qualification Directive serves to harmonise criteria for dealing with extra-territorial applications.⁷⁰

[268] It appears, then, that we must read the Qualification Directive "in accordance with" international asylum law (cf. Article 63(1) TEC): the instrument applies only to third country nationals who lodged an application in the territory or at the border of the Member States. Thus, the restrictions on the territorial scope that apply to the Procedures Directive apply to the Qualification Directive as well.⁷¹ If we assume that the various pieces of legislation do form a "system", this reading is self-evident. For the Qualification Directive merely regulates when an alien qualifies for protection, not when the merits of the application must be considered. That matter is addressed by the Procedures Directive (read in conjunction with the Dublin Regulation): if the application is lodged at the border or in the territory, if examination is required and if this examination must address whether the claim is well-founded (see number [250]).

Arguably, then, the Qualification Directive addresses applications processed in procedures as laid down in the Procedures Directive, and the territorial limitation of that instrument applies - although neither instrument states so in an explicit manner. This reading solves the issue of the territorial scope as far as qualification for refugee status is concerned. As to qualification for subsidiary protection, we saw above that the Procedures Directive necessarily applies to requests for subsidiary protection in Member States that do not run a separate procedure (number [264]). Arguably, the restriction to the territorial scope laid down in the Procedures Directive and the Dublin Regulation applies in such cases too. For "subsidiary protection should be

complementary and additional to the refugee protection enshrined in the [Refugee Convention]”.⁷² A reading of the scope of Member State obligations on subsidiary protection as if they exceeded the scope of obligations towards refugees would run counter to this consideration.

[269] In summary, CEAS legislation applies only to persons who do not possess the nationality of a Member State, and only in the case that an application was lodged at the border or in the territory of the Member States. The personal scope raises two issues. First, the scope of obligations on “applicants for asylum” may vary among Member States, depending on the question of whether they happen to have separate procedures for other forms of protection than refugee protection. If they do, the CEAS rules on applicants for subsidiary protection do not (or not necessarily) apply. Hence, the scope of protection afforded by the CEAS may differ among Member States; such differences are at odds with the objectives of the asylum legislation. Second, the scope of obligations as regards “applicants for asylum” as defined in the Procedures Directive is decisive for the scope of obligations as regards “applicants for subsidiary protection” as addressed in the Qualification Directive. The gap in protection for applicants for subsidiary protection yields to uncertainty as to the scope of application of the Qualification Directive. Arguably, it follows from a reading to object and purpose that even in cases where the Procedures Directive does not apply to an application for subsidiary protection, the geographical scope of relevant Qualification Directive provisions must be defined in accordance with it.

4.9 Concluding remarks

[270] The Directives on Qualification, Procedures, Reception Standards and Temporary Protection as well as the Dublin Regulation all refer to the concept of the Common European Asylum System. As constituents of a system, their rules must be read in conjunction. Thus, it appeared that the Procedures Directive determines the geographical scope of the Qualification Directive.

The above-mentioned measures share a number of features. They all apply to non-EU citizens, i.e. third country nationals and stateless persons (henceforth referred to as third country nationals). They all serve two main objectives: preclusion of secondary movements and the safeguarding of rights of third country nationals. They all represent the initial stage of a harmonisation process. The Directives on Qualification, Procedures and Reception Standards

as well as the Dublin Regulation apply to “applications” lodged within the territories or at the borders of the Member States. Finally, except for the Dublin Regulation they all set minimum standards. The wording of the definition of the nature of these standards varies among the measures, but reflects in all relevant instruments the same understanding: Member States may adopt or maintain domestic standards that are more favourable for the third country national than the standards set by the Directives on Qualification, Procedures, Reception Standards, Temporary Protection and Family Reunification. This definition is in accordance with the concept of minimum standards as analysed in paragraph 3.4.

In two important respects the legislation does not establish a regime common to all Member States. First, none of the Community measures applies to Denmark; and some do not apply to Ireland or the United Kingdom. Second, the definition of “application” leads to differences in scope of application. In states that operate a single system for processing both applications for refugee protection as well as for subsidiary protection, the Dublin Regulation, the Procedures Directive and the Reception Standards Directive apply to applicants for both forms of protection. In Member States that run separate procedures, these measures do not (necessarily) apply to applicants who specifically apply for subsidiary protection.

[271] The legislation making up the Common European Asylum System establishes four protection statuses: refugee status, subsidiary protection status, applicant status and temporary protection status. On four issues, the CEAS sets rules for all or some of these statuses: qualification, procedures for qualification and withdrawal of the status, allocation and secondary rights. In the following chapters, I will describe and analyse the rules on these four issues, their conformity with relevant international law and, where relevant, how rules on various statuses relate to each other.

Chapter 5 deals with qualification for refugee, subsidiary protection and temporary protection status. The rules on beginning and ending as well as exclusion from applicant status are so tightly connected with the rules on procedures that they are better addressed in connection with the latter. Besides, the qualification for applicants shares few elements with qualification for the other three protection statuses; a combined discussion would therefore not be fruitful. As the “dependant statuses” of the family members do not concern the need for protection because of a threat of human rights violations in the country of origin, I do not address them as separate “protection statuses”, but treat these categories in the context of the secondary rights of the four types of statuses.

Chapter 6 addresses procedures for granting or withdrawing protection statuses, and Chapter 7, the rules on allocation for applicants and temporary protection beneficiaries. The discussion of allocation of applicants concerns not only the Dublin system as established by the Dublin Regulation, the Dublin Convention and the agreements with Iceland, Norway and Switzerland, but also the various safe third country arrangements set out in the Procedures Directive. In Chapter 8 the rules on secondary rights are discussed, including those that somehow address family unity. Judicial protection and related issues are addressed in Chapter 9.

NOTES

- ¹ Cf. number [49].
- ² Cf. Preamble recitals (4) QD, (1) and (3) PD, (3) RSD and (3) DR. The concept is also referred to in the basis for asylum legislation in the Constitution for Europe – cf. Article 267(2) CfE, see number [232] above.
- ³ Preamble recital TPD (1). And we may observe that Article 266(2)(c) defines a “common system of temporary protection” as a constituent of the Common European Asylum System.
- ⁴ Cf. Battjes & Spijkerboer 2005.
- ⁵ The Dublin Convention was concluded in 1990, long before the 1999 Tampere European Council took place (see number [43]). The Family Reunification Directive does refer to the Tampere Conclusions, but serves to “ensure fair treatment of third country nationals residing lawfully on the territory of the Member States and that a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union” (Preamble recital (3) FRD).
- ⁶ Cf. Article 63(1)(d), (2) first clause *jo* (2)(a) and (1)(a) and (b) TEC.
- ⁷ Explanatory Memorandum to the QD Proposal, p. 3 (Com(2001)510def, OJ [2002] C51E/325).
- ⁸ Article 3(1) *jo* 2(b) PD.
- ⁹ Article 3(3) PD, see number [263] below.
- ¹⁰ Cf. Article 3(1) RSD, see number [600].
- ¹¹ Articles 23(1) *jo* 24 PD – see number [372].
- ¹² Article 29(1) *jo* 19, 20 and 25 PD – see number [373].
- ¹³ Cf. Article 25(1) PD, see number [427].
- ¹⁴ Article 29(1) PD, see number [371].
- ¹⁵ Cf. Articles 3(1) and 9(1) FRD.
- ¹⁶ Article 5 *jo* 2(a) TPD.
- ¹⁷ In earlier versions, the Common European Asylum System encompassed yet another, fifth category: long term resident refugees (cf. *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents* (COM/2001/0127 final), OJ C240E/79-87, Article 3(2)). But according to Article 3(2) of the Directive as adopted, it does not apply to them (Directive 2003/109, OJ [2004] L16/44: “*This Directive does not apply to third-country nationals who: [...] (b) are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status; (c) are authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or have applied for authorisation to reside on that basis and are awaiting a decision on their status; (d) are refugees or have applied for recognition as refugees and whose application has not yet given rise to a final decision*”.

- ¹⁸ Articles 23 QD, 3(1) RSD and 15 TPD; see paragraphs 8.4.3, 8.7.3 and 8.8.3.
- ¹⁹ Cf. the first clauses of the Preambles to the relevant instruments.
- ²⁰ Articles 1 QD, PD, RSD, TPD, DR and FRD, and Preamble recitals (6) QD, (5) PD, (7) RSD, and cf. Preamble recitals (8) TPD and (4) DR.
- ²¹ Preamble recitals (1) QD, PD, RSD, TPD, DR and FRD.
- ²² Preamble recitals (7) QD, (6) PD, (8) RSD and (9) TPD. The Dublin Regulation does not state so explicitly, but the objective applies by virtue of the reference to the objectives of the Dublin Convention; see number [478].
- ²³ Preamble recital (4) FRD. Social and economic cohesion is mentioned as an objective in Article 3(1)(k) TEC.
- ²⁴ Cf. Articles 17(3) QD and 6(2) PD.
- ²⁵ Cf. Preamble recitals (1) QD, PD, RSD, TPD and DR.
- ²⁶ Cf. Preamble recital (1) FRD.
- ²⁷ Preamble recital (2) FRD.
- ²⁸ Preamble recital (10) TPD.
- ²⁹ Preamble recitals (11) QD, (9) PD, (6) RSD and (12) DR.
- ³⁰ Preamble recitals (2) QD, PD, RSD and DR.
- ³¹ Preamble recital (25) QD.
- ³² Preamble recitals (10) QD, (8) PD, (8) RSD, (15) DR and (2) FRD.
- ³³ Cf. Articles 63(1)(b), (c), (d) and (2)(a) TEC; pursuant to the second last clause of Article 63, measures based on paragraph (3)(a) are also minimum standards – see number [215].
- ³⁴ Articles 3(5) TPD and FRD.
- ³⁵ Articles 3 QD, 4 PD and 4 RSD.
- ³⁶ Preamble recitals (8) QD, (7) PD and (15) RSD.
- ³⁷ Preamble recitals (6) QD and FRD.
- ³⁸ Preamble recital (6) QD.
- ³⁹ Preamble recital (5) PD.
- ⁴⁰ Preamble recital (7) RSD.
- ⁴¹ Articles 1 *jo* 2(a) DR define the personal scope as third country nationals by reference to Article 17(1) TEC, the other instruments speak of “third country nationals and stateless persons” (Articles 3(1) *jo* 2(b) PD, 1 and 2(c) and (e) QD, 1 *jo* 2(c) TPD, 3(1) RSD, 1 *jo* 2(a) FRD). We may observe that the Common European Asylum System applies the term “third-country national” in two different meanings: in the Dublin Regulation, the term encompasses “stateless persons”, whereas it does not in the mentioned Directives.
- ⁴² Article 3 RC, 26 CCPR, and 14 ECHR; cf. paragraph 6.4.6.
- ⁴³ Articles 3(1) *jo* 2(c) PD, 3(1) *jo* 2(c) RSD and 3(1) *jo* 2(d) DR. Further requirements for entitlement to benefits laid down in these instruments, such as lawful presence, will be discussed in paragraph 8.7.1.
- ⁴⁴ Article 2(c) DR, 2(b) RSD, 2(b) PD.

- ⁴⁵ Article 2(a) QD.
- ⁴⁶ For practical purposes, we may observe that according to K. Hailbronner, *Study on the Asylum Single Procedure (“One-Stop Shop”) Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, European Commission 2002 (http://europa.eu.int/comm/justice_home/doc_centre/asylum/studies), pp. 5-6 and 48-63, of the 15 states member of the EU before 1 May 2004, only five run separate systems (Belgium, France, Ireland, Italy and Luxembourg), the 10 other states run procedures combining the requests relevant for European asylum law statuses. I have no data on the 10 new Member States.
- ⁴⁷ Article 3(3) PD. Incidentally, this provision is awkwardly worded: Article 15 QD does not define “kinds of protection”, but the kinds of harm that constitute ‘serious harm’ for the purposes of Article 2(e) QD (see number [275]), the definition of persons who are eligible for “subsidiary protection”. Article 3(3) PD should hence be read as referring to “the other kind of protection as defined in Article 2(e) QD”.
- ⁴⁸ Article 3(4) PD and 3(3) RSD; cf. Preamble recital (16) RSD: “[...] *Member States are [...] invited to apply the provisions of this Directive in connection with procedures for deciding on applications for forms of protection other than that emanating from the Geneva Convention for third country nationals and stateless persons*”.
- ⁴⁹ Article 2(e) QD in fact requires that eligibility for refugee status is examined before eligibility for subsidiary protection status – see number [354].
- ⁵⁰ Cf. Article 3(4) RSD: “*Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for third-country nationals or stateless persons who are found not to be refugees [emphasis added, HB]*”.
- ⁵¹ Article 2(g) QD.
- ⁵² As acknowledged in the Preambles to the relevant legislation, cf. the recitals QD (40), TPD (26), DR (17), DAR (7), RSD (21) and FRD (18).
- ⁵³ Cf. Preamble recitals TPD (25) and RSD (20); as to the participation of the UK in both instruments, cf. recitals TPD (24) and RSD (19).
- ⁵⁴ Cf. Preamble recitals FRD (17).
- ⁵⁵ Cf. Preamble recitals (38) and (39) QD, (32) and (33) PD, (17) DR.
- ⁵⁶ Cf. Preamble recital (8) DAR.
- ⁵⁷ Articles 3(1) PD, DR and RSD.
- ⁵⁸ Presumably, in order to prevent misunderstandings on the meaning of the term “territory” - Articles 3(2) PD and RSD. Article 4(4) DR states a special rule that applies to applications lodged with embassies of Member States within the European Union – see number [480].
- ⁵⁹ Cf. number [393] below.
- ⁶⁰ Cf. Articles 63(1)(a), (b) and (d) TEC, cf. number [185] above.

- ⁶¹ According to Article 5(3)(a) TPD, that Council decision includes a circumscription of the groups of persons to whom the temporary protection regime applies.
- ⁶² Cf. Articles 8(3) and 15(3) TPD, cf. further below under number [622].
- ⁶³ Cf. Article 3(1) FRD.
- ⁶⁴ Cf. Articles 13 and 18 QD, see further numbers [274] and [275].
- ⁶⁵ Preamble recitals (4) and (7) QD.
- ⁶⁶ Preamble recital (25) QD.
- ⁶⁷ With a few exceptions that do not concern us here (cf. Articles 30 and 28 RC, see number [566] below).
- ⁶⁸ Cf. Noll 2000, p. 432-438 and 440-441.
- ⁶⁹ Cf. Noll, Faegerlund & Liebaut 2002: out of the then 15 Member States only four did so, and one of them (The Netherlands) abolished it since.
- ⁷⁰ Ibid.
- ⁷¹ The legislative history of the Qualification Directive also suggests so. Article 3 of the Commission Proposal defined the geographical scope of the instrument. A number of delegations commented that “*the place where applicants lodge their application is a matter for the Directive on asylum procedures. Anyway, the scope of the present Directive must be consistent with the one to be established in the aforementioned Directive on procedures*” (Council doc. 7882/02, Asile 2002/20, 24 April 2002, p. 5, footnote 4). The provision was first amended (Council doc. 10596/02, Asile 2002/36, 9 July 2002), then deleted without any (further) reasons stated (Council doc. 12199/02, Asile 2002/45, 25 September 2002).
- ⁷² Preamble recital (24) QD.

Chapter 5

Qualification

The Common European Asylum System establishes four protection statuses – refugee, subsidiary protection, temporary protection and applicant status. The definition of applicants has been addressed in the previous Chapter (see paragraph 4.7). In the present Chapter, I discuss the definitions for the other statuses. Comparison shows that refugee, subsidiary and temporary protection statuses share a number of elements: requirements on risk, harm, alienage and exclusion (paragraph 5.2). These elements as well as the requirements on cessation of these statuses will be discussed in combination, in paragraphs 5.3 to 5.6. In paragraph 5.7 I will briefly address a fifth protection status established by the Qualification Directive. Hierarchy and concurrence among all CEAS statuses (hence including applicants status) will be discussed in paragraph 5.8.

The discussion of the qualification for asylum in paragraphs 5.3 to 5.6 involves assessment of the compatibility of the CEAS rules with international asylum law (the central question of this inquiry, see paragraph 1.2). Relevant aspects of international law are briefly introduced in paragraph 5.1; the findings on this compatibility are summarised in paragraph 5.9.

5.1 CEAS statuses and international asylum law

[272] Rules on qualification for refugee, subsidiary protection and temporary protection statuses are laid down in the Qualification and Temporary Protection Directives. Rules on qualification as refugees and on applicants must, pursuant to Article 63(1) first clause TEC, be “in accordance with [the Refugee Convention] and relevant international law”. The Qualification Directive provisions on qualification for subsidiary protection and the Temporary Protection Directive are all based on Article 63(2)(a) TEC. These rules must comply with general principles of Community law reflecting relevant international asylum law (cf. numbers [127] and [137]).

Which rules of international asylum law are relevant for qualification for CEAS statuses? It follows from Article 63(1) TEC that the rules on “qualification as refugees” are rules on qualification as refugees in the sense of the Refugee Convention (see number [189]); the Preamble to the Qualification Directive at numerous instances confirms so.¹

The rules on qualification for subsidiary protection serve to identify “persons genuinely in need of international protection”,² that is protection “other-

wise” than Refugee Convention protection.³ Protection “on a discretionary basis on compassionate or humanitarian grounds” falls outside the scope of the instrument.⁴ According to Preamble recital (25) QD,

“[the] criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection [...] should be drawn from international obligations under human rights instruments and practices existing in Member States.”

So, the scope of “subsidiary protection” may be broader than the scope of protection under international asylum law other than refugee protection, as it may encompass criteria based on “practices existing in Member States”. Conversely, not all forms of protection under international asylum law are included: protection on “compassionate or humanitarian grounds” falls outside the scope of the instruments.⁵

Neither the Qualification Directive, nor any other CEAS instrument, identifies the European Convention of Human Rights or another instrument of international law as relevant for qualification for subsidiary protection. But the Explanatory memorandum to the Proposal for the Qualification Directive states that

“[t]he definition of subsidiary protection employed in this Proposal is based largely on international human rights instruments relevant to subsidiary protection. The most pertinent of them being (Article 3 of the) European Convention of Human Rights [...], (Article 3 of) the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and (Article 7 of) the International Covenant on Civil and Political Rights.”⁶

Thus, the prohibitions of *refoulement* ex Articles 3 ECHR, 3 CAT and 7 CCPR informed the definition of subsidiary protection.

Temporary protection beneficiaries are defined as persons who may fall within the scope of Article 1A(2) RC (cf. Article 2(c) TPD, see number [276] below); consequently, all rules on temporary protection should be “compatible with the Member States’ obligations as regards refugees”,⁷ that is, with the Refugee Convention. As its beneficiaries may fall within the scope of the prohibitions of *refoulement* of other aliens than refugees, temporary protection should be compatible with Articles 3 CAT, 3 ECHR and 7 CCPR as well.

[273] Hence, Articles 33 read in conjunction with 1 RC, 3 ECHR, 3 CAT and 7 CCPR serve both as sources of, and as standards for assessment of the criteria for qualification for CEAS statuses. We should observe that those CEAS criteria do not, or not necessarily, address the full scope of the prohibitions of

refoulement. They set minimum standards that do not or not necessarily completely approximate law on the issues addressed (cf. numbers [213] and [222]). Further, the objective of precluding secondary movements of applicants (cf. number [253]) may have resulted in a focus on issues where domestic asylum legislation of the Member States diverged, which do not necessarily include all key aspects of qualification for protection under international law.

Finally, we should observe that the criteria for qualification for a CEAS protection status address qualification for a particular form of protection: a set of secondary rights that includes the right to remain in the Member States and other benefits (to be discussed in Chapter 8). Articles 3 CAT, 3 ECHR and 7 CCPR on the other hand identify persons who may not be expelled to their country of origin. Such persons may not be entitled to CEAS protection status, for example, because they committed crimes as meant in Article 1F RC (see paragraph 5.6). This distinction is reflected in the Preamble recitals of the Qualification Directive that define its main objective as the identification of persons who are “genuinely” in need of protection, and state that the Directive “seeks to ensure full respect for the right to asylum” laid down in Article 18 Charter.⁸ In other words, the Qualification Directive rules on qualification serve to identify persons who are entitled to “asylum” as meant in Article 18 Charter, but not (necessarily) all of the persons who are entitled to protection from *refoulement* under Articles 3 ECHR, 3 CAT and 7 CCPR.

The scope of persons entitled to protection under the prohibitions of *refoulement* ex Articles 3 ECHR, 3 CAT and 7 CCPR does therefore not coincide with the scope of persons entitled to subsidiary protection. The CEAS addresses the Member States’ obligations under the prohibitions of *refoulement* only partially. Those obligations may apply to persons who cannot qualify for CEAS protection statuses. The terrorist who committed a crime against humanity as meant in Article 1F RC is not entitled to subsidiary protection, and hence falls outside the scope of the Qualification Directive. The same applies to the scope of “temporary protection”.⁹ Article 3 ECHR may prohibit his expulsion or extradition, but the Member State’s obligations under the prohibitions of *refoulement* fall outside the scope of Community law. As regards refugee status, the issue is somewhat different as the Refugee Convention itself defines in the exclusion clauses of Article 1 RC who is not entitled to Refugee Convention benefits, despite any well-founded fear of persecution – persons to whom Article 1F RC applies are excluded from Refugee Convention benefits as well as from CEAS protection statuses. But the grounds for exclusion of refugees from protection from *refoulement* laid down in

Article 33(2) RC do serve as criteria for a separate protection status (see paragraph 5.6.2).

In the analysis of the rules on qualification I will address the question whether or to what extent these rules secure observance of Article 1 read in conjunction with 33 RC, 3 CAT, 3 ECHR and 7 CCPR. The legal consequences of the “gaps” in protection that the CEAS shows in this respect will be addressed in Chapter 9.

5.2 Definition elements

[274] Who are entitled to the CEAS protection statuses? The term “refugee” is defined in 2(c) QD. In this definition, four elements may be distinguished:

“Refugee” means a third country national who, [1] owing to a well-founded fear of [2a] being persecuted [2c] for reasons of race, religion, nationality, political opinion or membership of a particular social group, [3] is outside the country of nationality and [2b] is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, [...] ¹⁰ and [4] to whom Article 12 does not apply [numbers added, HB]”. Article 12 QD renders the content of Article 1D, 1E and 1F Refugee Convention (cf. number [344]).

Article 2(c) QD deviates from the definition of “refugee” in Article 1 RC in only one respect:¹¹ it does not refer to Article 1C RC, on cessation of refugee status. It thus encompasses all elements of Article 1 RC relevant for the determination of refugee status. Where necessary in order to avoid confusion between the two definitions, I will refer below to refugees as defined by Article 2(c) QD as Directive refugees, and to refugees as defined by Article 1 RC as Convention refugees.

The elements of this Directive refugee definition are elaborated in Chapter II and III of the Qualification Directive (to be discussed in paragraph 5.3 to 5.6). Article 11 QD in Chapter III renders the cessation grounds of Article 1C RC (to be discussed in par 5.7). According to Article 13, the Member States “shall grant refugee status to” a third country national “who qualifies as a refugee in accordance with Chapters II and III.” It follows that refugee status must in principle be granted to persons fulfilling the complete refugee definition of Article 1 RC. In principle, for Article 14 QD states some additional grounds for refusal of refugee status on first application (that is, additional to those mentioned in Article 12 QD (Articles 1D, 1E and 1F RC); it concerns the grounds for expulsion in Article 33(2) RC; see par. 5.8). Article 14 QD fur-

ther defines grounds for withdrawal of refugee status, among those mentioned in Article 1C RC (see par. 5.6).

[275] Article 2(e) QD defines “persons eligible for subsidiary protection” as follows:

“‘Person eligible for subsidiary protection’ means a third country national or a stateless person [5] who does not qualify as a refugee and [1a] in respect of whom substantial grounds have been shown for believing that the person concerned, [3] if returned to his or her country of origin, [...] would face [1b] a real risk of [2a] suffering serious harm as defined in article 15, and [4] to whom Article 17 paragraph 1 and 2 does not apply, and [2b] is unable, or owing to such risk, is unwilling to avail himself or herself of the protection of that country” [numbers added, HB].

This definition is a hybrid between the prohibition of expulsion flowing from *refoulement* as worded by the European Court of Human Rights (elements [1a] and [1b], [3] and [2a]; see number [15] above and par. 5.3 below), and the Directive refugee definition (elements [2b] and [4] – Article 17(1) and (2) QD states grounds for exclusion). In addition, it requires that the person concerned is not a Directive refugee (element [5]; see par. 5.8). The definition elements are elaborated in Chapters II and IV of the Qualification Directive. Persons “eligible for subsidiary protection” in accordance with those Chapters must be granted subsidiary protection status (Article 18 QD). Article 19 QD states the grounds for withdrawal or cessation of the status (see par. 5.6).

[276] Temporary protection status can be granted in case of a “mass influx of displaced persons”.¹² Displaced persons are defined as

“persons who [3] have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and [2b] are unable to return in safe and durable conditions because of the situation prevailing in that country, [2a] who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

- (i) [2a] persons who have fled areas of armed conflict or endemic violence;
- (ii) persons [1] at serious risk of, or who have been the victims of, [2a] systematic or generalised violations of their human rights.”¹³

The existence of a “mass influx” is established by a Council decision that indicates the specific groups of persons to whom the temporary protection applies.¹⁴ The definition elements are not further elaborated in the Directive. Article 28 TPD gives one ground for exclusion (element [4], see par. 5.6). The

protection ends either when the maximum duration is reached or when the Council decides so.¹⁵ The actual granting of benefits is not done by Community institutions but by the Member States; the same holds true for exclusion.

Below, I first address the elements of the definitions of refugee, subsidiary protection status and temporary protection status beneficiaries and the elaboration on their elements in European asylum law, in the order as indicated by the numbers between [brackets] in the definitions above. In paragraph 5.3, I address “risk” assessment (element [1]), in 5.4 “harm” (elements [2a] - [2c]), in 5.5 “alienage” (element [3]) and in 5.6 “exclusion” (element [4] and Article 28 TPD). Cessation of the three mentioned statuses is addressed in paragraph 5.7.

5.3 Risk and proof

[277] The first element of the definition of refugees, “well-founded fear”, addresses the “risk”: a standard for the chance that the person concerned will indeed incur persecution or serious harm. The definition of persons eligible for subsidiary protection requires that “[1a] substantial grounds have been shown for believing that the person concerned [1b] would face a real risk”,¹⁶ a phrase taken from the standard case law of the European Court of Human Rights on expulsion (cf. number [15] above). Element [1b] is the counterpart of the term “well-founded fear” in the refugee definition and establishes the risk standard at “real risk”. Element [1a] in addition addresses the burden and standard of proof. These issues will be addressed in par. 5.3.1. The element (persons who are at) [1] “serious risk of, or who have been the victims of” human rights violations in the definition of displaced persons (for the purposes of temporary protection) will be discussed in par. 5.3.2.

5.3.1 Refugee and subsidiary protection

The level of risk

[278] The required level of risk for refugees, “well-founded fear”, is not elaborated upon in the Qualification Directive, in contrast to the Commission’s Proposal for the Qualification Directive.¹⁷ According to Carlier, a fixed level would not even be required as this level varies depending on the severity of the persecution feared.¹⁸

As to subsidiary protection, article 2(e) QD requires that the “risk” be “real”. This criterion occurs in the case law of the European Court of Human Rights (see number [15] above). It can be argued that the real risk criterion sets a stricter standard than well-founded fear.¹⁹ The Qualification Directive does not elaborate on this standard. But it appears that the distinction in risk assessment between qualification for refugee and for subsidiary protection status is intentional, as the real risk criterion also replaces the well-founded fear test that applied to subsidiary protection in the Commissions Proposal for the Qualification Directive.²⁰

Article 3(1) CAT does not define a particular level of risk – it speaks of a “danger” that the applicant will be subjected to torture. Arguably, the level of risk required by the Directive may be higher than the one that applies under the Convention Against Torture.²¹ The Human Rights Committee requires in expulsion cases ex Article 7 CCPR “real risk” taking the form of “necessary and foreseeable consequence”²², stricter than “real risk” as applied by the Strasbourg court.²³

Hence, the application of the ‘real risk’ criterion secures compliance with Articles 3 ECHR and 7 CCPR as to risk assessment. But persons within the scope of Article 3 CAT may not qualify for subsidiary protection, if the ‘danger’ of torture does not amount to ‘real risk’.

Burden of proof

[279] As to the burden of proof,

“Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection [...; which] consist of the applicant’s statements and all documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection”.²⁴

The definition of subsidiary protection requires that “grounds have been shown”, and hence explicitly places the burden of proof on the applicant.²⁵ This is in conformity with relevant case law of the European Court of Human Rights, but at odds with the prohibition of *refoulement* in the Convention Against Torture, which is neutral on the matter.²⁶ The Directive definition of refugees does not elaborate on the burden of proof; arguably, it follows from Article 4 QD that it lies with the applicant,²⁷ in conformity with the UNHCR Handbook.²⁸ The terms “may consider” give the Member States discretion not

as to the burden of proof, but rather as to the duty to submit grounds “as soon as possible”. It follows from Article 7(1) PD that applications should not be rejected “on the sole ground that they have not been made as soon as possible”.²⁹

[280] As to the evidentiary standard, Article 4(1) QD merely states that the application should be “substantiated”. The definition of subsidiary protection beneficiaries speaks of “substantial grounds”.³⁰ This standard is implied by both relevant case-law of the European Court of Human Rights on the prohibition of exposure to ill-treatment ex Article 3 ECHR,³¹ as well as under Article 3(1) CAT.³² Again, the definition of Directive refugees is silent on the matter.

There is one exception to the discretion Member States enjoy as regards the burden of proof and the evidentiary standard. If the applicant is a national of a state designated as a “safe country of origin” on the “minimum common list” of safe countries to be adopted by the Council, the Member States must consider the application “unfounded” if the applicant cannot adduce “serious grounds” for considering the country unsafe in his particular circumstances.³³ The safe country of origin concept and in particular this standard will be addressed in paragraph 6.4.5.

The assessment

[281] How should the risk be assessed? It is the “duty” of the Member States, “in cooperation with the applicant”, to assess “the relevant elements of the application”,³⁴ that is, to assess whether or not the application for protection is substantiated. Article 4(3) QD gives a non-exhaustive list (“assessment includes”) of issues that should be taken “into account”.³⁵ It concerns

all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied”.

Article 7(2) PD requires that in order to conduct an “appropriate examination at first instance”, Member States must secure that “precise and up-to-date information” is obtained from various sources such as UNHCR on “the general situation in the countries of origin of applicants”. Absent, however, is explicit mention of the obligation laid down in Article 3(2) CAT, which states that

“[f]or the purpose of determining whether there are such grounds [for considering that the applicant is in danger of being subjected to torture upon removal, HB], the competent authorities shall take into account all relevant

considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.

Hence, the Directive does not secure observance of assessment in conformity with the Convention Against Torture. The Qualification Directive does furthermore not elaborate on the *relevance* of the general situation in the country of origin for the assessment. In this respect, again, the “safe country of origin” arrangement provides for an exception (see further par. 6.4.5).

[282] Next to the general situation, the assessment should address,

“the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm”,

and

“the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm [...]”.³⁶

Pursuant to Article 4(4) QD,

“The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant’s wellfounded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated”.³⁷

Hence, previous persecution or serious harm, or “direct threats” thereof, give rise to a rebuttable presumption that the applicant qualifies for refugee or subsidiary protection.

As to the individual position and personal circumstances, the Preamble to the Qualification Directive states as regards the factor of “age” that

“[t]he “best interests of the child” should be a primary consideration of Member States when implementing this Directive”,³⁸

which appears to refer to Article 3 of the UN Convention on the Rights of the Child.³⁹

Finally, we should note that Article 4(3)(c) QD (quoted above) requires that the assessment of whether acts to which the applicant has been (or could be) exposed, amount to persecution is conducted “on the basis of the applicant’s personal circumstances”. Hence, the factors that should be taken into account in the assessment according to Article 4(3) QD does not address the possibi-

lity of group persecution, explicitly referred to in Article 2 of the 1996 Joint Position.⁴⁰

Credibility

[283] Often, applicants will not be able to substantiate aspects of their statements with documentary or other evidence. According to Article 4(5) QD,

“those aspects shall not need confirmation, when the following conditions are met:

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements, at the applicant’s disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
- (c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case;
- (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- (e) the general credibility of the applicant has been established.”

Thus, the applicant’s statements should be accepted as facts for the purpose of the assessment of the application, if his “credibility” has been established.⁴¹ But if one of these conditions is not fulfilled, the relevant aspect of the claim may be regarded as not “substantiated” (with due consequences for the claim for protection). Apart from the requirement that the applicant should have reported at the earliest possible moment, all elements relevant for the credibility assessment seem to be taken from the UNHCR Handbook.⁴²

In themselves, these requirements seem quite compatible with relevant international law. Absent however is a consideration on circumstances when Member States should not turn down a claim merely on the grounds that statements were not “coherent and plausible” or otherwise failed the conditions set out in Article 4(5) QD. Mental disorder, cultural differences and so on may in individual cases account for vagueness in the applicant’s statements.⁴³ Further, we may observe that pursuant to Article 4(5)(b) read in conjunction with 4(2) QD, inconsistencies or otherwise which concern other issues than the flight situation, such as the travel route, may affect the credibility of the applicant. Finally, the Qualification Directive does not explicitly require that applicants for refugee status enjoy the “benefit of the doubt”.⁴⁴

It follows from Article 34(2) PD that the benefit of the doubt as laid down

in Article 4(5) QD does not apply to subsequent applications dealt with in the ‘preliminary procedure’. This exception is discussed under number [439].

Concluding remarks

[284] When comparing the requirements on the first element of the refugee and subsidiary protection definitions, we may observe that the Qualification Directive makes a distinction as to the required level of risk (“well-founded fear” versus “real risk”). Neither of these criteria is elaborated upon, so the Member States may apply identical requirements. For both categories, the burden of proof rests with the applicant. One provision elaborates the element of risk and proof for both definitions (Article 4 QD). This may further result in erasing any distinctions between application of the well-founded fear and the real risk criteria.

[285] When comparing the Directive standards to relevant international law, it appears that the standards for assessing the credibility of the applicant or of how well-founded his fear is, are not at variance with international law. But the Directive does not ensure that the well-founded fear criterion is applied in accordance with the Refugee Convention. In particular, a direction for the level of chance is absent though it appears that in this respect state practice shows considerable differences.⁴⁵ Likewise, explicit recognition of group persecution is absent. The definition of subsidiary protection is strongly oriented to the prohibition of *refoulement* ex Article 3 ECHR. The more lenient or at least more open standards in the Convention Against Torture both as to the risk standard as well as to the relevance of the general human rights situation have been neglected. As a consequence, aliens who fall within the scope of Article 3 CAT may not qualify for subsidiary protection.

5.3.2 Temporary protection

[286] Risk criteria play a different role in qualification for temporary protection. Real risk and well-founded fear serve to assess the degree of probability that a certain individual will be subjected to persecution or serious harm. Temporary protection on the other hand applies to a whole group of persons from a certain ethnic background or region, designated by the Council.⁴⁶ It is therefore the Council that decides on the risk of infringements on human rights to be attained for instalment of temporary protection. Individuals applying for temporary protection do not have to prove any risk they run, merely

their belonging to the group of persons to whom the temporary protection applies.

Still, risk assessment does play a certain rôle in the context of temporary protection, for the Temporary Protection Directive does not leave the Council complete discretion when assessing the risk. The definition of displaced persons specifies two situations where temporary protection could be established. The first situation concerns “persons who have fled areas of armed conflict or endemic violence”; it does not establish any link between the harm (violence) and the persons eligible for protection.⁴⁷ The second however does, where it speaks of persons at “serious risk or who have been the victims of, systematic or generalised violations of their human rights”.⁴⁸ Mere occurrence of systematic or generalised violations of human rights is apparently not enough for installing temporary protection. There must be a *prima facie* risk of such violations - either the aliens are at “serious risk” of being subjected to such violations, or they were already subjected to it.⁴⁹ I will come back to the “serious risk” criterion when discussing Article 15 of the Qualification Directive below.

5.4 Harm

[287] Element [2] in the definitions of refugees, persons eligible for subsidiary protection and persons eligible for temporary protection defines the predicament that entitles the alien to international protection. It consists of several parts. First, a harmful act, that is (roughly speaking) a serious violation of human rights (element [2a]); second, inability to get protection from such acts from the authorities of the country of origin (element [2b]). The refugee definition employs yet a third element: the predicament must be due to “reasons of race, religion, nationality, political opinion or membership of a particular social group”, the ‘Convention grounds’ (element [2c]).

The Qualification Directive elaborates on several aspects of the element “harm”. Article 9 QD defines which harmful acts constitute “persecution” for the purposes of the refugee definition, Article 15 QD defines the acts that amount to “serious harm” as required by the definition of persons eligible for subsidiary protection (discussed in paragraph 5.4.1). The issue of the “actors of harm”, the identification of the agents whose actions may count as harmful acts, is elaborated for both refugee and subsidiary protection in Article 6 QD (see paragraph 5.4.2). The definition of protection and actors of protection (agents that afford ‘protection’ for the purposes of both definitions) in Articles

7 and 8 QD also applies to both definitions (paragraph 5.4.3). The Convention grounds, relevant for refugee protection, are elaborated upon in Articles 9 and 10 QD (paragraph 5.4.4).

Various types of harmful acts may give rise to temporary protection (see number [306]). The definition of displaced persons does address the issue of protection, but not the agents of protection or harm; these issues are addressed in combination under number [323].

5.4.1 Harmful acts

5.4.1.1 Persecution

Persecution in the Refugee Convention

[288] The Refugee Convention speaks of “being persecuted”, but does not define what kind of acts amount to “persecution”. Nor does any other instrument of international law provide for an authoritative interpretation.⁵⁰ Some guidance on the meaning of the term is offered by Article 33(1) RC, that prohibits expulsion of a refugee to a country where “his life or freedom would be threatened” on account of one of the persecution reasons. As the purpose of this provision is to prevent exposure of a refugee to persecution, a threat to life or freedom amounts to well-founded fear of persecution.⁵¹ State practice, the UNHCR Handbook as well as most commentators support the view that certain other acts or measures may also constitute persecution acts.⁵² Often, “persecution” is interpreted by reference to human rights treaties. It is generally accepted that a violation of human rights must attain a certain level of seriousness in order to constitute persecution,⁵³ but there is uncertainty both as to the minimum level of seriousness of the violation, as well as to the scope of human rights whose violation may give rise to persecution.

[289] Hathaway proposes to interpret the term persecution by reference to the Universal Declaration of Human Rights (UDHR), to which the Refugee Convention explicitly refers,⁵⁴ the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁵ because these instruments codify the rights set out in the Universal Declaration, and because of their almost universal accession.⁵⁶ On the basis of these instruments, three categories of obligations relevant for the reading of the term persecution can be identified.⁵⁷ First, rights stated in both the UDHR and the CCPR, from which the latter allows no dero-

gation, such as the prohibition on torture and inhuman or degrading treatment and punishment, the right to life, and the prohibition on slavery.⁵⁸ Second, rights stated in both the UDHR and the CCPR, from which states may derogate in certain circumstances, such as freedom of thought and other “political” rights. The third category concerns rights stated in the UDHR and laid down in the ICESCR, or not codified in either the CCPR or the ICESCR – economic and cultural rights.

Most commentators hold that failure to protect from breaches of the rights in the first category will under any circumstances amount to persecution, and failure to ensure those in the second category will do so generally.⁵⁹ A reading in conjunction with Article 33 RC supports this view as to the first and, partially, the second category. It appears that infringements on the remaining rights of the second and those of the third category, such as deprivation of means of existence, would in themselves not constitute persecution, but serious violations may do so, in combination with other measures.⁶⁰ According to Vanheule, support for this approach can be found in state practice.⁶¹

Persecution in the Qualification Directive

[290] According to Article 9(1) and (2) QD,

“1. Acts of persecution [...] must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can inter alia take the form of:

- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment, which is disproportionate or discriminatory;
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (e) prosecution or punishment for refusal to perform military service in

a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
(f) acts of a gender-specific or child-specific nature.”

Persecution acts are defined as acts that affect the individual in a sufficiently serious (or severe)⁶² way. The required level of seriousness is defined in Article 9(1)(a) by means of reference to “basic human rights”. Thus, serious violations of basic human rights are persecution acts. Article 9(1)(b) explicitly accepts persecution on cumulative grounds: acts or measures that taken alone do not constitute persecution may do so in combination. All this seems well in line with state practice and academic writing as discussed above.⁶³

[291] An aspect that deserves closer attention is the distinction between “basic” and other human rights. The distinction has significant legal consequences, as it follows from Article 9(1) that violation of other human rights than “basic” ones could amount to persecution only in combination with “other measures”. Article 9(1)(a) specifies that “basic human rights” are “in particular the rights from which derogation cannot be made under Article 15(2)” ECHR – that is, the right to life, freedom from ill-treatment, slavery and servitude, and from retroactive criminal liability.⁶⁴ From a methodological point of view, interpretation of the term “persecution” by reference to the European Convention of Human Rights is flawed. The interpretation of the Refugee Convention by Article 9 QD addresses obligations under general, not regional international law, binding many states not party to the European Convention of Human Rights. Interpretation by reference to the Covenant would have been a more obvious choice.

For practical purposes, we should observe that the specification suggests that violations of derogable rights (the second category identified above), such as the freedom of expression and freedom from arbitrary detention could, taken separately, not be persecution acts. This would run counter to state practice. Further, it would be at odds with the context of Article 1 RC, Articles 31(1) and 33(1) RC. For example, well-founded fear of arbitrary detention would, arguably, constitute a “threat to freedom” as meant in those provisions, and hence fear of persecution. We may further observe that in contrast to Article 15(2) ECHR, Article 4 CCPR marks the right to recognition as a person before the law and the freedom of thought, conscience and religion as non-derogable.⁶⁵ Hence, not even the full range of rights of the first category identified above would be “basic” for the purposes of Article 9(1) QD.

So it seems that Article 9(1)(a) suggests an overly restrictive scope of

human rights whose violation could, taken separately, amount to persecution. But by virtue of the term “in particular” the Directive does not *impose* such a restriction. We should further observe that instances of persecution acts listed under Article 9(2), for example, discriminatory legal or administrative measures (Article 9(2)(b)), do not imply a restriction to the rights mentioned in Article 15(2) ECHR, or to non-derogable rights. It appears that the reference to non-derogable rights serves to place beyond doubt that severe violations of those rights constitute persecution, but does not restrict the scope of “basic human rights”.

[292] Among the instances of persecution acts listed in paragraph 9(2), Article 9(2)(e), on persecution by prosecution of draft evaders, is of particular interest, as state practice varies among Member States.⁶⁶ According to the UNHCR Handbook, such prosecution amounts to persecution if the deserter or draft evader faces disproportionately severe or discriminatory punishment⁶⁷, if military service would require participation in military action contrary to the applicant’s genuine political, religious, moral or conscientious objections.⁶⁸

Article 9(2)(e) is considerably more restrictive in scope than both the UNHCR Handbook as well as the practice of some Member States: it addresses only the situation that “performing military service would include crimes or acts falling under the exclusion clauses”, that is, crimes or acts against humanity and the like as meant in Article 1F RC.⁶⁹

In summary, Article 9 QD defines persecution acts as acts that attain a minimum level of severity. Severe violations of “basic” human rights do so, violations of other human rights only in combination with other measures. The category of “basic” human rights encompasses non-derogable rights meant in Article 15(2) ECHR, but is not restricted to them. The Directive acknowledges that prosecution of conscientious objectors to military service may constitute persecution.

5.4.1.2 Serious harm

[293] The counterpart to “persecution” in the definition of persons eligible for subsidiary protection is “serious harm as defined in Article 15” of the Qualification Directive. This provision runs as follows:

“Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an appli-

- cant in his or her country of origin, or in the case of a stateless person, his or her country of former habitual residence; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

I will subsequently discuss all three types.

Article 15(a) QD

[294] It follows from the Preamble to the Qualification Directive that the criteria for recognition of persons as eligible for subsidiary protection "should be drawn from international obligations drawn from human rights instruments and practices in Member States".⁷⁰ No instrument of international law binding the Member States explicitly prohibits expulsion in the event of imminent death penalty or execution, but it may be implicit in Article 1 of the Sixth Protocol to the ECHR.⁷¹ And Article 19(1) Charter prohibits expulsion of a person to a state where he "would be subjected to the death penalty [...]".⁷²

Article 15(b) QD

[295] The first part of Article 15(b) ("torture or inhuman or degrading treatment or punishment") is identical to Article 3 ECHR.⁷³ The provision may also cover "torture" as relevant for the prohibition on expulsion ex Article 3 CAT. Article 7 CCPR defines ill-treatment in slightly different terms, as it speaks of subjection to "torture or to *cruel*, inhuman or degrading treatment or punishment [emphasis added, HB]".⁷⁴ If we assume that the provision lists ill treatment in a falling scale of seriousness, acts that qualify as "cruel" treatment or punishment would also qualify as "inhuman or degrading treatment or punishment." We may further observe that according to Article 27(1)(c) PD, the safe third country exception may be applied only when in the third country "the prohibition on removal in breach of the right to freedom from torture and *cruel*, inhuman or degrading treatment as laid down in international law is respected [emphasis added, HB]". This provision acknowledges that imminent "cruel" treatment may bar expulsion. Hence, Article 15(b) could cover all acts of harm meant in Article 7 CCPR.

[296] The second part of Article 15(b) restricts the scope to ill treatment "of an applicant *in* his or her country of origin" (emphasis added). Article 2(e) QD limits the scope to persons running a real risk of serious harm "if returned to his or her country of origin." Noll points out that cases where serious harm is feared after chain expulsion by the country of origin to a third country would

fall within the scope of Article 2(e), but out of the scope of Article 15(b); as Article 15(a) nor 15(c) contains a similar geographical limitation, an odd distinction between these provisions and Article 15(b) results.⁷⁵

But arguably, the words “in his country of origin” in Article 15(b) do not serve to restrict the geographical scope, but the substantive scope of the provision. For present purposes, we should distinguish between two types of cases where expulsion would be in breach of the prohibitions of *refoulement*. First, ‘classic’ asylum cases wherein the alien fears torture or inhuman treatment upon arrival in the country of destination, inflicted by the state or by some third party. In this type of case, the ill-treatment is the foreseeable consequence of the expulsion, and therefore prohibited,⁷⁶ but the expulsion itself does not constitute or attribute to the ill-treatment. Second, “humanitarian cases” where the act of expulsion does attribute to the liability under Article 3 ECHR, as addressed by the European Court of Human Rights in *D v UK*.

This judgement concerned expulsion of a convicted drug trafficker to St Kitts and Nevis, who suffered from AIDS in an advanced stage. Whereas D received “sophisticated treatment and medication in the United Kingdom, and the care and kindness of a charitable organisation”, he could not expect due medical care or “moral or social support” in St Kitts and Nevis.⁷⁷ According to the summary of *D v UK* by the European Court of Human Rights in *Henao*, “[a]n abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant’s death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant’s fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3.”⁷⁸

So, the expulsion amounted to “inhuman treatment” because of the combined effect of the circumstances awaiting the alien in the country of origin and the “withdrawal” of medical and mental care.

[297] Hence, Article 3 ECHR prohibits expulsion not only in the case that the alien runs a real risk of being subjected to ill-treatment upon expulsion in the receiving country, but also in case the combined effect of exposure to suffering in the receiving state and withdrawal of care by the act of expulsion amounts to ill-treatment. Article 2(e) QD might encompass both types of prohibited expulsion. The requirement in Article 15(b) QD that the ill-treatment occur

“in” the country of origin however excludes “humanitarian grounds” cases from the scope of subsidiary protection. It appears from the legislative history of the Qualification Directive that exclusion of those cases was indeed the purpose of the second part of Article 15(b),⁷⁹ and that Preamble (9) QD originally had the purpose to sustain this reading:

“[...] third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive”.⁸⁰

Thus, Article 15(b) addresses harm as meant in Articles 3 CAT, 7 CCPR and 3 ECHR, with the exception of harm in “humanitarian” cases like *D v UK*. This still leaves the matter of the geographical scope of Article 15(b) to decide. As stated above, the terms “in the country of origin” (or former habitual residence) serve to exclude “compassionate grounds” cases, not to restrict the geographical scope as defined in Article 2(e) QD. This explains why neither Article 15(a) nor Article 15(c) contains a similar clause. The imposition of the death penalty (Article 15(a)), or the exposure to a threat to indiscriminate violence (Article 15(c)) can occur only within the receiving state, and Member States cannot incur on such grounds the type of liability accepted in *D v UK*. Consequently, the geographical scope as defined in Article 2(e) applies to all sub-paragraphs of Article 15, hence cases where ill-treatment would be faced after expulsion from the country of origin are covered by Article 15(b) QD as well. We may read the term “in the country of origin” in Article 15(b) as “by an actor in the territories of a receiving state upon expulsion to the country of origin”.

Article 15(c) QD

[298] The third type of serious harm is “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” In order to have any meaning next to Article 15(a) and (b), it must have a different scope. What scope exactly, is not clear at first sight. Below, I will first argue that Article 15(c) does not address other types of harm than Article 15(a) or (b) QD. Then, I will argue that the provision in fact modifies the risk criterion applicable in the situation it addresses.

Article 15(c): type of harm

[299] The scopes of Article 15(a) and (b) differ as to the nature of the harm addressed (death penalty and execution in the first, and torture or inhuman treatment or punishment in the second provision). Article 15(c) addresses

“threat to life or person”. “Life” is pretty much covered by Article 15(a), though there is room to argue that expulsion cases engaging the Member States’ responsibility under Article 2 ECHR could cover issues outside the scope of Article 15(a), in case the threat to life is not due to execution or death penalty, but stems from a government controlled death squad or from a third party. But the practical meaning of Article 2 next to Article 3 ECHR is negligible. In all expulsion cases wherein Article 2 was invoked, the European Court of Human Rights ruled that responsibility under the provision raised no separate issue next to Article 3 ECHR.

That leaves us the “threat to person”, a somewhat imprecise term. If we understand “person” as physical integrity, this element is covered by Article 15(b) to a large extent. If “person” should be attributed the meaning of “personal” (as opposed to physical) integrity, Article 15(c) would potentially cover any violation of any human right, which would be an unreasonable interpretation.

[300] Relevant rules of international law may shed more light on the issue. The phrase “violence to life or person” occurs in Common Article 3 of the 1949 Conventions. It has indeed been argued in scholarly literature that these instruments implicitly prohibit *refoulement*, but this view is not generally accepted.⁸¹ Still, it might be relevant for interpretation of Article 15(c);⁸² one of the draft versions explicitly referred to the instrument.⁸³ Common Article 3 concerns situations of “armed conflict not of an international character”. As to “[p]ersons taking no active part in the hostilities”,

“the following acts are and shall remain prohibited [...]:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court [...].”

The provision hence addresses situations in the receiving state not dissimilar to those envisaged by Article 15(c): civilians caught in armed conflict, fearing attacks on “life and person”. But if anything, Common Article 3 of the 1949 Conventions suggests that “life and person” have a considerably narrower scope than Article 15(a) and (b), as “humiliating and degrading treatment” appears not to be covered by “life and person” in Common Article 3 (as it is separately mentioned under c). In sum, a reading in the light of Common

Article 3 does not yield a scope of Article 15(c) QD that does not fall within those of Articles 15(a) and (b).

[301] The Explanations to the draft of Article 15(c) as it was ultimately adopted offer yet another explanation for the added value of Article 15(c) next to paragraphs (b) and (c). They state that situations of indiscriminate violence and systematic human rights violations cannot count as “treatment” in the sense of Article 15(b) (or death penalty or execution in the sense of Article 15(a)).⁸⁴ Hence, Article 15(c) would differ from (b) as to the nature of the harmful act. However, there is no reason to assume that Article 3 ECHR (whereon Article 15(b) is based, as we saw above) does not cover violence of indiscriminate nature. It is true that according to the case law of the European Court of Human Rights, only intentionally inflicted harm may amount to degrading or inhuman treatment or torture.⁸⁵ This “intention” serves to distinguish ill-treatment from, say, ecological disasters (that cause the same degree of suffering as implied by ill-treatment). But the term “treatment” does not imply any degree of individualisation. If a state party to the European Convention engages in the random bombing of its citizens, it would surely be liable for ill-treating them. Obviously, systematic human rights violations or indiscriminate violence in armed conflicts abroad are in themselves not enough to bar expulsion, but the reason is not that it concerns types of harm outside the scope of the treatment. Rather, this is due to the real risk criterion, applicable in expulsion cases.⁸⁶ Hence, the intentional nature of “ill-treatment” does not explain the additional value of Article 15(c) next to Article 15(b) QD.

Article 15(c) QD: “serious and individual threat”

[302] The emphasis in the Explanations placed on the indiscriminate nature of the harm offers a clue: it indicates that Article 15(c) in fact modifies the applicable risk criterion. This reading is strongly endorsed by the words “serious and individual threat” in Article 15(c), which address the assessment of risk. Read in conjunction with the definition of persons eligible for subsidiary protection (Article 2(e) QD, quoted under number [275]), Article 15(c) provides that a third country national qualifies for subsidiary protection if there are substantial grounds for believing that upon return, that person would face *a real risk of a serious and individual threat* to life or person. The difference between this criterion and the “real risk” standard applicable to Article 15(a) and (b) QD would then be that the former demands not a real risk of ill-treatment, but a real risk of a threat of ill-treatment – provided that the risk is the result of indiscriminate violence.⁸⁷ Arguably, then, in case of indiscriminate violence a

lesser degree of individualised risk is required in order to qualify for protection, than in case of death penalty or ill-treatment.

[303] An argument against this reading of Article 15(c) is the heading to the provision: “serious harm”, not “risk”. However, provisions that elaborate on the requirements for qualification for subsidiary protection do not neatly distinguish between the elements of the definition of persons eligible for subsidiary protection. For example, Article 6 QD defines actors of harm, i.e. the second element, partially by reference to Article 7 QD, on the actors of protection, the fourth element of the definition (see par. 5.4.3 below). According to Preamble recital (26),

“[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.”

So certain “risks” do “normally not create” (but, it appears, exceptionally might) a “threat” that is “harm” – a somewhat confused statement, that if anything gives further evidence of just how much risk and harm are conflated in Article 15(c). Moreover, it is hard to see what meaning the terms “serious and individual threat” could possibly have, other than a specification of the risk standard.

Obviously, the proposed reading also puts some strain on the definition of the term “individual” as employed in Article 15(c), which strain is repeated by the quoted Preamble recital. This strain is however inherent in the provision, juxtaposing the “individual” character of the threat and the “indiscriminate” nature of the harm. Hence, any reading of the provision would be at odds with one of both elements. The one proposed here has the advantage that it gives Article 15(c) substantial meaning next to Article 15(a) and (b) – which result could not be achieved if the usual risk criterion applied, thus the “individual” character were stressed.

[304] Another objection might be that the proposed reading stretches the scope of persons protected under Article 15 beyond the scope of persons that fall under Article 3 ECHR and the other prohibitions of *refoulement*. But there is no reason to assume that Qualification Directive rules are necessarily restricted to approximation of domestic law within the ambit of the Member States’ international obligations. The legal basis for Community rules on qualification for subsidiary protection, Article 63(2)(a) TEC, does not imply so (see number [195]). It is true that Preamble recital (9) states that

“third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for inter-

national protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.”⁸⁸

But we should observe that this statement does not address all forms of protection granted on a discretionary basis – only protection “on compassionate or humanitarian grounds”. This subject matter is addressed specifically in Article 15(b) QD (see number [297]). Confirmation of the view that the personal scope of subsidiary protection may exceed the scope delimited by international law comes from Preamble recital (25) QD, which states that

“criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection [...] should be drawn from international obligations under human rights instruments and practices existing in Member States [emphasis added, HB].”

And it appears that most Member States do grant some form of protection to victims of generalised violence.⁸⁹

Serious harm: assessment

[305] If all this is correct, Article 15 QD amounts to the following. Article 15(a) prohibits expulsion in case of a real risk of death penalty or execution. The real risk criterion can and does apply; the death penalty presupposes that the victim has been identified, hence the required degree of individualisation is by definition met. Article 15(b) addresses cases of real risk of harm to physical integrity upon expulsion. The real risk criterion in effect entails a certain degree of individualisation. Only if the risk of harm to life or person is due to “indiscriminate violence in situations of international or internal armed conflicts”, does the criterion of a “real risk of a serious and individual threat” apply, as in such situations the real risk criterion cannot be possibly met (Article 15(c) QD). This lowered risk standard does not altogether do away with the requirement of individualisation. This follows from the term “individual threat”. We saw that according to Preamble recital (26), risks to which the population at large is “generally exposed” do not “normally”, “in themselves” create an individual threat for the purposes of Article 15(c). A certain degree of individualisation is therefore required under Article 15(c), that is, “normally”- which implies that in exceptional circumstances, a serious threat to life or person for reason of indiscriminate violence would do.

5.4.1.3 Temporary protection

[306] Article 2(c) of the Temporary Protection Directive specifies two types of

harm: (i) “armed conflict or endemic violence” and (ii) persons “at serious risk or who have been the victims of systematic or generalised violations of human rights”. As the occurrence of a mass influx of displaced persons is established by Council decision, it is up to the Council to decide whether the situation in a certain region or for a certain group of person amounts to these types of harm.

The Temporary protection Directive does not oblige the Council to specify which of the grounds mentioned in Article 2(c) applies.⁹⁰ Such an indication however would be relevant for applications for subsidiary protection on the ground of Article 15(c) QD by (former) temporary protection beneficiaries. If the temporary protection was introduced on the second ground, it has been established by the concerned Council decision that the (former) temporary protection beneficiaries run a “serious risk” of those violations. If those violations occurred in situations of armed conflict (as usually will be the situation), the threat will concern life or person. Hence, the concerned persons would only have to prove that the (already established) “serious risk” (cf. Article 2(c)(ii) TPD) amounts to a “serious and individual threat” in order to fulfil the requirements of Article 15(c) QD. If on the other hand the temporary protection was introduced on the first ground, the Council decision contributes little to proving the “serious and individual threat to life or person”.

5.4.1.4 Comparison

[307] When comparing the definitions of harmful acts that may give rise to refugee, subsidiary or temporary protection, we may observe that latter category is the broadest: all violations of human rights may give rise to the temporary protection regime. On the other hand, only “sufficiently serious” infringements on human rights are “persecution acts”. The range of acts that may qualify as “serious harm” for the purposes of subsidiary protection appears even smaller. In this respect, the scope of subsidiary protection is hence smaller than the scope of refugee protection under the CEAS.

Arguably, Article 15(c) QD addresses not only the nature of the harm, but the applicable risk criterion as well – under the provision, a “serious threat” is required. As argued above, this criterion is more lenient than the “real risk” criterion. As far as Article 4 QD states identical rules on the “well-founded fear” and “real risk criterion”, these are identical. It would therefore seem that the “serious threat” criterion is more lenient than the “well-founded fear” criterion as well. But as the Qualification Directive does not elaborate upon the

level of risk required on the latter standard, no definite conclusion can be drawn.

5.4.2 Actors of harm

[308] Article 6 QD addresses the issue of agents of persecution or serious harm for both refugee and subsidiary protection. The matter is of great importance, as state practice in the European Union on this point diverges, with significant consequences for numbers of recognised refugees and persons otherwise in need of protection. I will first discuss relevant international law, and then address the rules laid down in Article 6 QD. Temporary protection will be briefly addressed under number [323].

Actors of persecution or serious harm: international law

[309] On the matter of agents of persecution, two views can be distinguished. According to the “accountability view”, only actions for which the state can be held accountable can be harmful acts. According to another view, the question of whether or not the action can be accounted to the state is immaterial; the relevant question is whether the persons involved are effectively protected against human right violations (the “protection view”). In both views, actions (1) committed or (2) condoned by state organs or (3) by a *de facto* authority may be harm, but actions committed by a third party (which is not a *de facto* authority) where (4) the state (or the *de facto* authority) is unable to offer protection or (5) there is no state (or *de facto* authority), can constitute serious and unjustified harm according to the protection view, but not so according to the accountability view.⁹¹

[310] The protection view fits in with Article 1A(2) RC far better than the accountability view. The provision speaks of an individual who “is unable or, owing to such [well-founded] fear, unwilling to avail himself of the protection of that country” (i.e. the country of origin, or of former habitual residence). Noll observes that Article 1A(2) RC distinguishes two categories of refugees, as far as protection is concerned, namely the refugee “unable [...] to avail himself of the protection of that country” (i.e. the country of origin), and the refugee “owing to such fear, unwilling to avail himself” of that protection.⁹² The distinction makes sense if the second category concerns those persecuted *by* the country: they are able to get protection but unwilling, as the protector is also the persecutor. The first category then concerns the situation where no

protection is available – either because the country is not able to afford it, or because no state exists.

Hence, all five situations identified above seem to be covered by the provision. This reading is reinforced by Article 31(1) RC, which speaks of refugees coming “from a *territory* where their life or freedom was threatened in the sense of Article 1” (emphasis added), hence refugees fleeing a territory, not a country.⁹³ Further, Noll observes that in the Refugee Convention, limitations to the protective scope are made in an explicit manner; hence, the absence of an explicit restriction of persecution acts to state acts warrants the extensive reading. Finally, the purpose of the instrument endorses an extensive reading.⁹⁴

[311] As to the prohibitions of *refoulement*, for the purposes of Article 3 ECHR, the identity of the agent of harm is immaterial, as the provision prohibits any action which has as a direct and foreseeable consequence that the individual will be subjected to ill-treatment.⁹⁵ In expulsion cases, the European Court of Human Rights indeed consistently speaks of the risk of being subjected to ill treatment “*in* the receiving country” (emphasis added),⁹⁶ not “*by*” that country. In *D v UK*, the Court stated that the prohibition on expulsion applies both when the ill-treatment “emanates from [...] acts from the public authorities in the receiving country”, as well as when it emanates “from non state-bodies in that country when the authorities are unable to afford appropriate protection.”⁹⁷ The latter holds true both when there is a state willing to protect, but unable to control the non-state actor,⁹⁸ as well as when there is no state.⁹⁹ Thus, all five situations identified above fall within the ambit of the prohibition.

Article 3 CAT cannot address harm inflicted by non-state agents, as Article 1 of the Convention Against Torture defines “torture” as a type of harm “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Accordingly, the Committee against Torture has stated that

“the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of Article 3 of the Convention.”¹⁰⁰

Thus, only situations (1) and (2) fall within the scope of Article 3 CAT.

As far as I know the Human Rights Committee has never addressed the issue. Arguably, the reasoning on Article 3 ECHR would apply to Article 7 CCPR as well.

[312] Hence, all five situations mentioned under number [309] are covered by both the Refugee Convention and the prohibition on exposure to ill-treatment ex Article 3 ECHR; the first and second situations may also fall within the scope of Article 3 CAT.

It was already noted that state practice on the matter of agents of persecution and harm diverges among the Member States. As far as the application of the Refugee Convention is concerned, seven Member States (Austria, France, Germany, Ireland, Italy, Portugal and Spain) hold the accountability view. The protection view is held by eight States (Belgium, Denmark, Finland, Greece, Luxembourg, the Netherlands, Sweden, and the United Kingdom).¹⁰¹ In Germany, the interpretation of the European Court of Human Rights is not followed on this point.¹⁰²

Actors of harm: the Directive

[313] According to Article 6 QD,

“Actors of persecution or serious harm include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned under sub-paragraphs (a) and (b), including international organisations, are unable or unwilling to provide protection as defined in article 7 against persecution or serious harm”.

The provision covers actions committed (Article 6(a)) or condoned by the state (Article 6(c)), or committed (Article 6(b)) or condoned (Article 6(c)) by a *de facto* authority as well as the situation that the acts are committed by a third party (which is not a *de facto* authority) where the state is unable to offer protection (Article 6(c)). Hence, the provision covers the first four situations mentioned under number [309],¹⁰³ but it is unclear from the text of Article 6 QD whether the fifth situation, harm by a third party in a situation of total chaos, is also addressed. Article 6(c) can be read as presupposing the presence of a state or a *de facto* state as defined under (b), but one can also say that only a demonstration of inability to afford protection is required, which is established also if there is no agent of protection.

We should observe, however, that Article 2(c) QD (the Directive refugee definition) faithfully reproduces (as far as is relevant here) the text of Article 1A(2) RC. The reasoning on the relevant phrase in Article 1A(2) RC applies by analogy; and this reasoning favours the second reading. Article 2(e) QD speaks of a person who, “if returned to his country of origin [...] would face

a real risk of suffering serious harm as defined in Article 15”, which provision defines such harm, as far as is relevant for present purposes, as ill-treatment “in the country of origin”. A reading in accordance with Article 3 ECHR implies that in all five situations a person could qualify for subsidiary protection.

Incidentally, even if the narrow reading should prevail, the provision does not *exclude* that persecution acts may be committed in a situation of total chaos: according to the first clause of Article 6, the actors of harm “include” the listed entities.¹⁰⁴

Hence, Article 6 QD reflects the “protection view”, in accordance with the Refugee Convention and Article 3 ECHR. The arrangement is important for approximation of asylum practices in the Member States. Still, the arrangement is unsatisfactory from the point of view of international law, as the reference to Article 7 transposes the flaws of the latter provision to the issue of agents of persecution or serious harm, to which I will now turn.

5.4.3 Protection and actors of protection

For both refugee as well as subsidiary protection, Article 7(2) QD addresses the concept of protection, Article 7(1) actors of protection, and Article 8 QD internal protection (protection within the country of origin) specifically. I will address these three issues below.

Protection

[314] According to Article 7(2) QD,

“Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm *inter alia* by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.”

It follows from Article 7(2) that protection is “generally” provided for if two conditions are met: (1) the actors of protection take “reasonable steps” to prevent the harm from occurring, “*inter alia* by operating an effective legal system” addressing the harmful acts, and (2) the applicant has access to this protection. In this context, Annex II to the Procedures Directive is relevant. This Annex addresses the “safety” and hence presence of protection in the context of the “safe third country of origin concept” (see further paragraph 6.4.5). It states that relevant factors for determining whether or not a country of origin

is “safe”, are the “laws and regulations of the country of origin and the manner in which they are applied”, and whether “provision for a system of effective remedies against violations of” the rights and freedoms set out in the ECHR, “and/or” the CCPR “and/or” the CAT – “in particular”, Article 15(2) ECHR is made.

[315] The term “reasonable steps” in Article 7(2) QD is troublesome, as it seems to focus on the willingness rather than the ability to offer protection, implying that there is “protection” if the actor of protection is willing, though not (fully) able to afford it.¹⁰⁵ Moreover, the term “reasonable” suggests an amount of discretion on behalf of the examiner that is at odds with the Refugee Convention as well as with the prohibitions of *refoulement*. But the only possible standard for “protection” is that it reduces the risk below the level of well-founded fear or real risk - ¹⁰⁶ either protection is available, or it is not.

But on closer look, the arrangement seems to be in accordance with relevant international law. Article 7(2) states that one of the “reasonable steps” that the actor must (*inter alia*) take, is the operating of an “effective legal system for the detection, prosecution and punishment of acts” (emphasis added) of persecution or serious harm. Arguably, it follows from the effectiveness requirement that not (merely) willingness, but also ability to afford protection is necessary to qualify as an actor of protection. And according to Article 8(1) QD, internal “protection” is provided for only when “there is no well-founded fear of being persecuted or no real risk of suffering serious harm” (see further number [321] below). Arguably, it follows that the Member States may assume that an actor provides for “protection” only when this protection is effective to the extent that it precludes the fear or risk from being well-founded or real. Importantly, the term “generally” indicates that the assumption that protection is provided for by some actor of protection (which assumption may be based on the law and regulations of the country, and so on), is open to rebuttal. As to the access to protection, the Directive requires that the applicant “has” access (Article 7(2) QD), not, that he previously has had an opportunity to get access to it. This is in line with the forward-looking nature of recognition as a refugee.

Agents of protection

[316] According to Article 7(1) QD, not only states, but also “parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State” may offer “protection”. The latter

category qualifies as an actor of protection if it “controls” the state or “a substantial part” of its territory. It follows from the Preamble that “a substantial part” should be read as “a region or a larger area within the territory of the state”.¹⁰⁷ Further “guidance” on the assessment of “whether an international organisation controls a State or a substantial part of its territory and provides protection” can be provided in Council acts that the Member States “shall” (not may) “take into account”.¹⁰⁸ Could such alternative sources provide for protection as required by international asylum law?

Articles 2(c) and 2(e) QD speak of “protection by that *country*” (i.e. the country of origin), following Article 1A(2) RC that speaks of “protection of that country”. Hathaway suggests that “country” means “state”, pointing to the nature of Convention protection as a substitute for protection by the state of nationality (or former habitual residence).¹⁰⁹ But one could argue that the same purpose is met if the protection is effective, no matter the identity of the entity affording it. It follows from Article 1D RC that the United Nations are a viable source of “protection or assistance” for the purposes of Article 1 RC (see number [344]). On the other hand, one may doubt whether protection by an international organisation could ever be sufficiently comprehensive and enduring for the purposes of Article 1A(2) RC, as defined in Article 7(2) QD. Moreover, such a reading renders the element “of that country” in Article 1A(2) RC redundant – an unreasonable interpretation.¹¹⁰

Thus, the actor of protection must qualify as “country” for the purposes of Article 1A(2) RC. According to its ordinary meaning, “country” does not or not necessarily mean “state”.¹¹¹ But the language “country of his nationality” employed in the same provision strongly implies that “country” simply means “state”. That Article 1A(2) does not apply the term “state” is in itself no indication.¹¹² But importantly, the Refugee Convention employs the term “territory” where a geographical designation in contrast to the institutional entity “country” is meant.¹¹³ If the effective protection approach as sketched above were intended, the term “protection within the territory of that country” would arguably have been used. Hence, “country” in Article 1A(2) RC means “state”. “Parties” cannot qualify as such - let alone “international organisations”.

Could parties or international organisations provide for protection from torture or ill-treatment for the purposes of the prohibition of *refoulement* ex Article 3 ECHR? In the judgement *H.L.R. v France*, the European Court of Human Rights ruled that Article 3 ECHR prohibits expulsion in case of real risk of ill-treatment by third parties if it has been shown “that the authorities of the receiving State are not able to obviate the risk by providing appropriate

protection”.¹¹⁴ Arguably, it follows that only “the authorities of the Receiving State” can offer “appropriate protection”. The Court touched upon the issue sideways again in the admissibility decision *Muratovic*, wherein the applicant alleged that the UN agency UNMIK was not “able to provide for minority groups the protection required”.¹¹⁵ The Court did not state that UNMIK’s role could not be relevant for the purposes of Article 3 ECHR. It declared the appeal inadmissible when it found that UNMIK would object to the return after an “individualised screening process”, that apparently addressed at any rate “violence and crimes against minorities”. It would follow that if UNMIK considers itself incapable of offering protection from such violence, there would not be protection relevant for the purposes of Article 3 ECHR. But it does not necessarily follow that the European Court deemed UNMIK capable of offering protection from ill-treatment, as it concerned a “humanitarian case”,¹¹⁶ and hence not a risk of ill-treatment by some party in Kosovo. As *Muratovic* therefore does not allow for any definite conclusions, we may cautiously assume on the basis of *H.L.R.* that only authorities of the receiving state are capable of offering protection from ill-treatment by third parties for the purposes of Article 3 ECHR. Application of Article 7(1) first clause and (b) QD would therefore be at variance with the Refugee Convention as well as the European Convention of Human Rights.

The internal protection alternative: international law

[317] Article 8 QD addresses the assessment of the “internal protection” alternative for both refugee and subsidiary protection status. I will first discuss relevant international law, and then the Directive provision.

According to Article 1A(2) RC, only persons who are unable or owing to well-founded fear unwilling to avail themselves of “protection” by the country origin can qualify for refugee status. Thus, if protection by that country is available, albeit only in part of that territory, the definition is not fulfilled. Hence, the internal protection alternative finds a basis in the “protection” element of the refugee definition.¹¹⁷ Importantly, this particular basis does affect the assessment of the internal protection: once an applicant has established that he has well-founded fear of persecution and protection from the country is not available in one area, this fear is not removed or otherwise affected by the finding that protection is available for him elsewhere in that country. Thus, the assessment of the internal protection alternative takes place against the background of established well-founded fear of being persecuted in one part of the country of origin¹¹⁸ (or, arguably, if such fear is assumed to be well-founded).

Hathaway and Forster identify four conditions that the alternative should

meet.¹¹⁹ First, the relevant area must be accessible for the applicant; otherwise, protection is not “available”, as required by Article 1A(2) RC. Second, “there must be reason to believe that the reach of the agent of persecution is likely to remain outside” the relevant area.¹²⁰ Thus, if the applicant fled a persecutor in one part of the country and has well-founded fear of being persecuted by the same agent in the “internal protection” area, “protection” is not available. Third, there must be no new risk of persecution, of persecution by another agent than the one the applicant had fled. All three requirements follow directly from Article 1A(2) RC.

[318] Fourthly, so Hathaway and Foster state, the alternative “protection” should exceed protection from persecution. The “notion of ‘protection’ clearly implies some affirmative defence or safeguard”, they argue, and this also follows from the Preamble, which states as one of the aims of the Convention “to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement”, that protection “includes the legal rights of the kind stipulated in the Convention itself”.¹²¹ As a consequence, “protection” is not available if the Convention benefits are not safeguarded in the internal protection alternative.

But why would “protection” in Article 1A(2) RC, understood as “an affirmative defence or safeguard”, address benefits like those laid down in Article 2-34 RC? In other contexts than the assessment of the internal protection alternative, “protection” means “protection from persecution”, that is, from serious violations of basic human rights. Most Refugee Convention benefits are economic and cultural rights, whose violation in principle does not constitute a persecution act for the purposes of Article 1A(2) RC (see number [289]). The assumption that in the context of assessment of the internal protection alternative “protection” includes safeguarding Convention benefits entails that the term has two meanings – *prima facie*, an unreasonable result. And why would the ‘broad’ reading of “protection” apply only to the internal protection issue? We may further observe that the Preamble recital (quoted above) refers to “protection” offered by host states, hence (a sort of) asylum, not to “protection” in Article 1A(2) RC. Application of its meaning to Article 1A(2) RC would run counter to its object and purpose. For these reasons, I think that the Refugee Convention does not require that the alternative protection should safeguard the benefits laid down in Articles 2-34 RC. In the context of the internal protection alternative, as in any other context, “protection” means protection from being persecuted.

[319] The approach to the “internal protection” alternative by the European Court of Human Rights appears to be in line with the one advocated by Hathaway and Foster to a fair extent. In *Hilal*, it considered whether (mainland) Tanzania constituted a “reliable guarantee against ill-treatment” that Hilal feared from actors of harm from Zanzibar, an autonomous part of the United Republic of Tanzania:

“[...] the situation in mainland Tanzania is far from satisfactory and discloses a long-term, endemic situation of human rights problems. Reports refer in general terms to police in Tanzania ill-treating and beating detainees [...] and to members of the Zanzibari CCM [the agent of serious harm in Hilal’s case, HB] visiting the mainland to harass CUF supporters [like Hilal, HB] sheltering there [...]. Conditions in the prisons on the mainland are described as inhuman and degrading, with inadequate food and medical treatment leading to life-threatening conditions [...]. The police in mainland Tanzania may be regarded as linked institutionally to the police in Zanzibar as part of the Union and cannot be relied on as a safeguard against arbitrary action [...]. There is also the possibility of extradition between Tanzania and Zanzibar [...]”.¹²²

Both the second as well as the third condition identified by Hathaway and Foster figure in this consideration: the possibility that the agents of harm from Zanzibar could track Hilal, and the chance of ill treatment by mainland Tanzanian authorities. In *Chahal*, the Court applied the same approach.¹²³ There is no reason to assume that the reference to “human right problems” (in the first clause of the quotation above) implies that violations of human rights other than ill-treatment are relevant for assessing the safety of the protection alternative: the Court explicitly focuses on “torture” and “inhuman and degrading treatment”.¹²⁴ The first condition that Hathaway and Foster mention, access, is not addressed in either judgement, but neither Hilal nor Chahal had brought up the matter. Arguably, protection by an internal alternative is not “effective” for the purposes of the prohibition on *refoulement* ex Article 3 ECHR if access is not secured.

In summary, the Refugee Convention as well as Article 3 ECHR allows for application of the internal protection alternative, provided that three conditions are met. First, the alternative must be accessible. Second, the applicant should be safe there from well-founded fear of persecution and real risk of serious harm from the agent of persecution or serious harm who threatens him elsewhere in the country. Third, there must be no well-founded fear of persecution or real risk of serious harm from another agent.¹²⁵

Internal protection: the Qualification Directive

[320] According to its heading, Article 8 QD specifically addresses “internal protection”. We may assume that the rules on protection at large laid down in Article 7 QD also apply. Article 8 QD hence serves to state that Member States “may” (not must) examine the availability of an internal protection alternative as part of the examination of the need for refugee or subsidiary protection status, and further lays down some special rules on this examination, which must be read in conjunction with Article 7 QD. For the purposes of the Directive, internal protection may be offered not only by the state but also by parties, organisations and international organisations “controlling a substantial part of the territory of the state” (cf. Article 7(1) QD). It was observed that this regulation runs counter to both the Refugee Convention as well as to Article 3 ECHR (in number [316]).

[321] As to the content of internal protection, Article 8(1) QD¹²⁶ states two conditions: (1) in a part of the country there is no well-founded fear of persecution or no real risk of suffering serious harm and (2), the applicant can be “reasonably expected to stay” there. Read in conjunction with Article 7(2) QD, the latter requirement is met only if an effective legal system as meant in that provision is in force. The first requirement effectively renders both the second as well as the third condition flowing from international law – safety from the agent of harm previously fled, and no alternative source of well-founded fear or real risk. As to the first requirement from international law, “access”, Article 7(2) QD requires that the applicant “has access”. However, it follows from Article 8(3) QD that the request for refugee or subsidiary protection “may” (not must) be turned down because availability of an internal protection alternative applies “notwithstanding technical obstacles to returning to the country of origin”. If there are technical obstacles to returning, the individual is unable to avail himself of the internal protection. Turning down the request on this ground is therefore at odds with Article 1A(2) RC,¹²⁷ and inconsistent with Articles 2(c) and (e) QD.

[322] As to the procedural aspects, we may observe that Article 8 QD does not require that the availability of internal protection is addressed until after assessment of the well-founded fear or real risk of the harm the individual fled from. But the requirement that the individual should be out of reach of the actor of that harm means that no meaningful assessment of the internal protection can be made without previous assessment of that well-founded fear or real risk. Further, Article 8(2) states that

“In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.”

This paragraph makes explicit that two rules laid down in Article 4(3)(a) and (c) QD (cf. number [282] above) also apply as to the assessment of the international protection alternative. First, the relevant moment of assessment is the present. It is therefore irrelevant whether the individual could have acquired access to the internal protection area before his entry into the European Union. Second, safety in general in some area is not enough for application of the provision; the individual’s circumstances must be taken into account to assess whether he has well-founded fear of being persecuted or runs a real risk of serious harm (cf. Article 8(1) QD). Both rules are in line with international law.¹²⁸

Temporary protection

[323] The Temporary Protection Directive does not contain any restriction as to the identity of the actor of harm. Article 2(c) of the Temporary Protection Directive gives a material definition of protection, speaking of the inability of displaced persons “to return in safe and durable conditions because of the situation prevailing in that country.” This open definition allows the Council to install temporary protection regardless of the identity of the agent of harm or protection.

The Council decision installing temporary protection necessarily addresses the internal protection alternative, as this protection applies to displaced persons “who come from a specific country or geographical area”.¹²⁹ If the protection applies to a group of persons “from a specific country”, no internal protection alternative is (apparently) available; if it applies to a group of persons from a specific area, other areas of the country are by implication an internal protection alternative.

Conclusions

[324] It follows from Article 7(2) QD that “protection” is afforded only when it is effective to the extent that it precludes the fear or risk from being well-founded or real, and that the applicant must still have access to this protection. This is in accordance with relevant international law.

According to Article 7 QD, protection can be offered by states, by “parties” and by “international organisations”. For the purposes of Article 1A(2) RC, only states can offer protection; the same holds true for Article 3 ECHR. The

latter view is reflected in the definitions of both refugees and of persons eligible for subsidiary protection – both speak of protection “by that country”. Hence, the overly wide definition of agents of protection in Article 7 is at odds with international law, and with Article 2(c) and (e) QD too.

The Refugee Convention and Article 3 ECHR set three conditions on the application of the internal protection alternative: the individual should have access to the relevant area, he should be safe there from the agent of persecution or serious harm he fled, and there should be no new source of persecution or serious harm. The rules in Article 8 read in conjunction with⁷ QD are in accordance with the second and third conditions, but Article 8(3) QD is at variance with the first one. Article 8 QD further confirms that a general assumption is not enough – the personal circumstances should be taken into account, as they are at the time of making the decision. Application of the internal protection alternative concept is not obligatory.

5.4.4 The Convention grounds

Element [2c], the Convention grounds, appears in the refugee definition only. Here, two issues will be addressed. First, the grounds themselves, addressed in Article 10 QD. The discussion below is largely focused on one reason whose elaboration in the Qualification Directive raises most interest, “membership of a particular social group”. Second, I address the “causal link”. Article 9(3) QD requires that the persecution act be committed for the reasons set out in the refugee definition, thus denying the relevance of those reasons for the absence of protection.

The grounds

[325] Article 10 addresses the “reasons of persecution” that figure in the refugee definition - “race, religion, nationality, political opinion or membership of a particular social group” (cf. Article 2(c) QD). The provision gives no exhaustive regulation, but lists “elements” that the Member States “shall take into account when assessing the reasons for persecution” (Article 10(1)). According to Article 10(2):

“When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution”.¹³⁰

Thus, it is immaterial whether the applicant actually holds the opinion or not, if the opinion is imputed to him. Nor does the Directive require a form of intent on behalf of the persecutor, which is in line with the Refugee Convention.¹³¹

On whom lies the burden of substantiating that a Convention ground applies? According to the UNHCR Handbook,

“it is for the examiner [...] to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the [Refugee Convention] is met with in this respect.”¹³²

The Directive does not explicitly address the matter. But we may observe that Article 4(1) and (2) QD distinguish between the applicant’s duty to submit relevant elements, including “the reasons for applying”, and the Member State’s duty to assess these elements, in “cooperation with the applicant”. The Convention grounds are not among the reasons for applying – an applicant seeks protection because of fear of being persecuted, irrespective of the reasons or the predicament. Rather, identification of Convention grounds is upon the Member States. Article 10(1) confirms that Member States must take the elements listed therein into account “when assessing” the reasons for persecution.

The elaboration on the persecution grounds “race”,¹³³ “religion”¹³⁴ and “nationality”¹³⁵ raise no particular issues;¹³⁶ “political opinion” will briefly be addressed below. Special interest justifies quite extensive elaboration on the reason of “membership of a particular social group”,¹³⁷ as state practice on its interpretation diverges significantly. Moreover, scope and meaning of this reason has received particular interest and debate as to its relevance for sex and age specific grounds.

[326] According to Article 10(1)(d),

“a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”

The provision appears to combine two criteria for identification of special social groups. The first indent states the ‘protected characteristics’ test. Under the ‘protected characteristics’ test as applied by several States party to the Refugee Convention, the criterion is some personal characteristic of individu-

als that deserves protection. Persons belong to a “particular social group” in the sense of Article 1A(2) RC when they share some characteristic they cannot possibly give up, or cannot be expected to give up.¹³⁸

The Directive acknowledges two kinds of protected properties. First, “characteristics” or “a common background” that cannot possibly be changed (for example sex or descent). Second, a “characteristic or belief” which the alien “should not be required to renounce” – for example, homosexuality.¹³⁹ The Directive does not require any degree of cohesiveness of the group in order to classify as a particular social group, nor is it required that all members of the group be persecuted.¹⁴⁰

The second indent of Article 10(1)(d) QD reflects part of the ‘social perception’ test. Under this test, a group must share some common attribute that makes them cognisable as a group in society. It appears that the ‘social perception’ test is applied in France and the United Kingdom.¹⁴¹ The second clause of Article 10(1)(d) QD addresses the second limb of the social perception test: only groups “perceived as different by surrounding society” could be particular social groups. This requirement applies cumulatively to the ‘protected characteristics’ test.¹⁴²

[327] Whereas Contracting states tend to apply either the protected characteristics or the social perception test, the Directive requires that both tests be satisfied.¹⁴³ Does it follow that the interpretation of “particular social group” that Article 10(1)(d) QD proposes is overly restrictive? Aleinikoff observes that in fact, virtually all groups that share ‘protected characteristics’ will also be socially cognisable because of those characteristics, and hence satisfy the social perception test as well.¹⁴⁴ Hence, the result of cumulatively applying both tests is, arguably, identification of the groups that meet the protected characteristics test.

Hathaway observes, however, that as a result of the ‘social perception’ requirement in Article 10(1)(d), groups like homosexuals or women are not recognised as “clear examples” of particular social groups (as they allegedly would have been if only the protected characteristics test applied).¹⁴⁵ The requirement would hence restrict the scope of persons identified by the protected characteristics test. It is true that according to Article 10(1)(d), it cannot be stated in the abstract that homosexuals or women constitute a particular social group, but arguably, such a statement can never be made in the abstract. For example, former landowners might have constituted a particular social group in Eastern Europe in the Communist era, but not so any more and never so in the West. The same reasoning applies to women and homosexuals.

Arguably, the social perception requirement in the second clause of Article 10(1)(d) QD refines the “protected characteristics test”, but does not set undue restrictions on its application.

[328] How about the reverse situation: could Article 10(1)(d) QD result in exclusion of groups that meet the social perception test, but not the protected characteristics test? Aleinikoff suggests that the social perception test may identify groups that could not meet the protected characteristics test, as social perception may identify groups by a common characteristic that is not innate or otherwise deserve protection.¹⁴⁶ Arguably, no confirmation for this contention can be found in state practice. At least the social perception test as applied by the House of Lords and the French Conseil d’État does not confirm this view. The fact that these courts did not specify the relevant characteristics as deserving protection does not mean that *any* common characteristic would suffice for identifying a “particular social group”, nor does this follow from the cases involved.

Besides, it may in practice be hard if not impossible to identify a group whose members share some characteristic that is not innate or deserves protection for another reason, otherwise than by the persecution of its members. But a particular social group should be identifiable apart from its members being targeted for persecution. Otherwise, the persecution and the persecution ground would coincide, which would be at odds with both wording and purpose of Article 1 RC.¹⁴⁷

There is, therefore, no reason to suppose that groups whose members share some characteristic that does not merit protection under the protected characteristic test should qualify as “particular social group” in the sense of Article 1A(2) RC. Consequently, the exclusion of such groups by Article 10(1)(d) QD is not at variance with the Refugee Convention.

[329] The provision further specifically addresses the definition of “particular social group” as to claims related to sexual orientation and gender.¹⁴⁸ As Article 10(1)(d) states that

“Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation.”

The proviso “[d]epending on the circumstances in the country of origin”, arguably, spells out the consequence of application of the social perception test. Hence, the effect of the provision is explicit acknowledgement that sexual orientation may satisfy the first requirement: it is a shared characteristic that

is so fundamental to identity that a person should not be required to denounce it. However, “[s]exual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States.” Arguably, the provision prescribes that prohibited conduct prompted by sexual orientation may not be considered as a property the person cannot be required to renounce. Finally, Article 10(1)(d) states that “[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article”. Consequently, “women” do “by themselves alone” not constitute a particular social group. But, arguably, “Pakistani women” might, if Pakistani society assigns them a distinct position. In effect, the clause seems to leave the matter to the Member States.

The causal link

[330] Article 2(c) QD requires, as Article 1A(2) RC does, that the fear of “being persecuted” is “for reasons of race, religion, nationality, political opinion or membership of a particular social group”. Article 9(3) QD states that “In accordance with Article 2 (c) [the definition of “refugee”, HB], there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in [Article 9(1)]”.

The provision rules out the possibility that the definition requirement “for reasons of” a Convention ground could be satisfied in case of a causal link between a Convention ground and the failure to offer protection. Article 10(1)(e) and (2) QD express the same view on the causal link, as they both require a nexus between the Convention ground “political opinion” and the persecutor.¹⁴⁹

In many cases, the persecution act will indeed be inflicted upon the individual for reasons of a Convention ground. Then, the requirement of a connection with a Convention ground is obviously satisfied. However, in other cases such a link may be absent, whereas the failure of the state to protect the individual from a non-state persecutor may be “for reasons of” a Convention ground. Does it follow from the Refugee Convention that in such cases well founded fear of being persecuted for reasons of a Convention cannot be established?

[331] Article 1A(2) RC speaks of the “well-founded fear of being persecuted” of a person who is “owing to such fear unable or unwilling to avail himself of the protection of” his country of origin. Thus, the fear is the result of two factors: persecution and absence of protection.¹⁵⁰ And there are two good reasons to assume that the causal link with the Convention ground concerns this

predicament, and not the persecution act (or actor) in particular.¹⁵¹ First, the passive voice applied in the phrase “being persecuted” (instead of for example “persecution for reasons of” a Convention ground). Second, the Convention’s fundamental purpose of defining the circumstances in which international protection, surrogate to protection by the refugee’s country of origin, is warranted. Hence, Article 1A(2) RC requires that the dire position of the individual, the result of the persecution and the absence of protection, be for reasons of a Convention ground. And this is so both if the absence of protection as well as when the infliction of the persecution act (or the threat thereto) is for reasons of a persecution ground. This view is broadly advocated in academic writing; moreover, supreme courts in several jurisdictions have explicitly accepted it.¹⁵²

[332] It appears, however, that this view is not generally shared. According to the Dutch Council of State, presently the highest court on asylum claims in the Netherlands,

“There is well-founded fear of persecution only when the persecution is based on one or more of the persecution grounds mentioned in [Article 1A (2) RC]. That assessment precedes the question of whether the authorities can offer protection from the alleged facts. [...; T]he lack of protection can come up only if the alleged threat can be reduced to one of the Convention grounds”.¹⁵³

Hence, only if the “alleged threat” (i.e. the alleged persecution act)¹⁵⁴ is inflicted for reasons of a Convention ground can a person qualify for refugee status, the reasons for failure to protect are immaterial. The only ground adduced for stating so is the order of assessment – first persecution for reasons of a Convention ground, then protection. The Council of State gives no grounds why this order of assessment applies.¹⁵⁵ The mere word order of Article 1A(2) RC cannot defeat the arguments based on both text and object and purpose mentioned above.

[333] Perhaps the Community legislator expresses the same view as the Dutch Council of State where it states in Article 9(3) QD that “*in accordance with Article 2(c) [QD], there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1*” (emphasis added). At any rate, this statement expresses the view that the restrictive reading follows from the text of the refugee definition.

But the Community legislator is not consistent in this matter. We saw above that Article 6(c) defines actors of “harm” by reference to actors of “protec-

tion”. And Annex II to the Procedures Directive, that addresses the safety “in general” of countries of origin for the purposes of the “safe third country of origin concept” (see paragraph 6.4.5.2), states that “in making this assessment”, namely, whether “there is [...] no persecution as defined in Article 9 [QD]”, “account shall be taken *inter alia* of the extent to which protection is provided against persecution [...]”. In both instances, it is acknowledged that occurrence of persecution cannot be established separately from the provision of protection. If, then, persecution and protection can not be addressed separately, there are no grounds for the view that the Convention grounds address one of the facets of the refugee’s predicament in particular.

In summary, it follows from the text and purpose of Article 1A(2) RC that the causal link with a Convention ground is established not only when the infliction of the persecution act (or the threat thereof), but also when protection is withheld for reasons of such a ground. As Article 9(3), Article 10(1)(e) and 10(2) QD require a link with a persecution act or the persecutor, they exclude the second possibility. In so far, these standards are overly restrictive interpretations of the Refugee Convention, in accordance with this instrument.

5.4.5 Concluding remarks

[334] The findings on the compatibility of the elaboration in the Qualification and Temporary Protection Directive on the several aspects of the element “harm” were summarised in the concluding paragraphs above. We saw that the definition of actors of harm in Article 6 QD is satisfactory from the point of view of international asylum law, and an important contribution to the harmonisation of asylum law in the Member States. However, this appraisal is affected by the overly wide definitions of agents of protection and the internal protection alternative in Articles 7 and 8 QD. Maybe superfluously, we should observe that acknowledging that persecution or serious harm may be inflicted by non state agents does not justify the view that protection could also be afforded by non-state agents. A person is in need of “international protection”, protection by another state than the one of origin, if he fears persecution or serious harm and “national protection”, protection by the country of origin, is not available.

The scope of protection afforded by Article 6 QD is also affected by the requirement in Article 9(3) QD, that there be a causal link between the persecution act and the persecution ground. If the state commits the persecutory act,

the actor of persecution and of protection is the same, so the causal link addresses the same entity. But this is different where the agents of persecution and of protection are not identical – that is, when a non-state agent commits the persecutory act. Thus, the overly restrictive reading by Article 9 QD affects in particular victims of persecution by non-state agents.

5.5 Alienage

[335] Element [3] of the definitions of directive refugees, of persons eligible for subsidiary, and of those eligible for temporary protection requires that the third country national is outside his country of origin.¹⁵⁶ A well-founded fear of persecution and real risk of serious harm will usually be based on experiences or events that occurred to the third country national in the country of origin. But exceptionally, the fear of being persecuted (or risk of being subjected to ill-treatment) may arise “*sur place*”: in another state, after departure from the country of origin. Article 5(2) QD states that a well-founded fear or real risk in such circumstances exists

“in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.”

This comes close to stating the “continuation of convictions” as a condition for well-founded fear or real risk. Continuation of convictions is sufficient, but not necessarily required for recognition of a claim under the Refugee Convention.¹⁵⁷ As to Articles 3 ECHR, 3 CAT and 7 CCPR, the intentions or purposes of a third country national are immaterial for state responsibility in expulsion cases. If for example a person converts abroad to some religion whose followers are persecuted or subject to ill-treatment in his country of origin, he has fear of being persecuted or runs a risk of being subjected to ill-treatment for the purposes of relevant international law. But according to Article 4(3)(d) QD, Member States must assess

“whether the applicant’s activities since he left his or her country of origin were engaged in for the sole or main purpose of creating the necessary conditions for making an application for international protection, so as to assess whether these activities will expose the concerned person to persecution or serious harm if returned to that country”.

According to the latter provision, scrutiny of the applicant’s motivation for engaging in those activities apparently merely serves to apply the usual standard of well-founded fear or real risk of persecution or harm.¹⁵⁸ This reading

is endorsed by Article 20(6) and (7) QD, which states that Member States “may reduce” residence conditions to Directive refugees and subsidiary protection beneficiaries who obtained their status “on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised”. It follows that engagement in activities for the purpose of acquiring refugee or subsidiary protection status does not impede the grant of that status (whether Articles 20(6) and (7) themselves are compatible with the Refugee Convention is another matter that will be discussed under number [590]).

[336] Temporary protection applies to persons who “have had to leave their country or region of origin, or have been evacuated”.¹⁵⁹ The quoted definition excludes application of temporary protection to persons from the same country or region for whom the threat arrives *sur place*. But Member States could solve the need for protection by extending the temporary protection to the concerned individuals pursuant to Article 7(1) TPD.¹⁶⁰

5.6 Grounds for refusal

An alien does not qualify for refugee status if Article 12 QD applies, and not for subsidiary protection status when Article 17(1) or (2) QD applies (element [4] in Articles 2(c) and (e) QD, see numbers [274] and [275] above). Article 14(5) read in conjunction with 14(4) and 17(3) QD set in addition facultative grounds for refusal of refugee and subsidiary protection status; Article 28 TPD does the same for temporary protection. I address here the obligatory and facultative grounds for refusal of the various statuses together.

The grounds for refusal may be divided into three groups. The first is based on Article 1F RC, the second on Article 33(2) RC and the third one on Article 1D and 1E RC.

5.6.1 Article 1F RC

Refugee status

[337] Article 12(2) QD states rules on exclusion which are close, but not identical to those laid down in Article 1F RC. According to Article 12(2) first clause, a third country national “is excluded from being a refugee when there are serious reasons for considering that” one of the exclusion grounds applies.

Exclusion is hence obligatory. It follows from the wording “excluded from being a refugee” that the individuals concerned are not merely excluded from the grant of refugee status as meant in Article 13 QD, but cannot qualify as a refugee.¹⁶¹

Article 12(2)(a) – (c) QD list the exclusion grounds of Article 1F RC,¹⁶² but is in one respect more precise. Article 12(2)(c) limits the “acts contrary to the purposes and principles of the United Nations”, mentioned in Article 1F(c) RC, to acts contrary to the purposes and principles “set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations”.¹⁶³ The 1996 Joint Position likewise identified the Charter as the document where those “principles” were to be found;¹⁶⁴ UNHCR also identified Articles 1 and 2 Charter as the provisions relevant for the purposes of Article 1F(c) RC.¹⁶⁵

[338] Article 12 QD offers guidance for the application of Article 1F RC on three issues. First, these exclusions grounds apply not only to persons who physically committed those acts, but also to persons who “instigate or otherwise participate in the commission” of those acts.¹⁶⁶ According to the UNHCR, it follows from relevant rules of international law and case-law of the International Criminal Tribunals on Rwanda and Yugoslavia that individual criminal responsibility for the purposes of Article 1F RC may indeed arise from instigation and some other forms of contribution to the commission of a crime.¹⁶⁷

Second, according to Article 12(2)(b) the commission of non-political crimes prior to “admission as a refugee” (as the text of Article 1F(b) RC runs) “means [prior to] the time of issuing a residence permit based on the granting of refugee status”. This reading accommodates application of the provision to *sur place* claims for refugee recognition.¹⁶⁸

Third, the provision offers guidance on the qualification of crimes as “non-political”. Article 1F(b) RC applies only to non-political crimes. For present purposes, we may distinguish between three categories of crimes.¹⁶⁹ First, purely political crime, such as high treason or electoral fraud. As these crimes cannot qualify as “non-political”, persons who committed these crimes cannot therefore be excluded from refugee status.¹⁷⁰ Second, crimes that are defined as non-political in treaty law, such as terrorism: these crimes fall by definition within the scope of Article 1F(b) RC.¹⁷¹ Third, an intermediate category of civil offences that are committed with a political objective. It is well-established state practice under the Refugee Convention that the assessment of the political nature of crimes meant in Article 1F(b) RC involves balancing of (*inter alia*) the seriousness of the crime and the motives of the individual who committed them.¹⁷²

Article 12(2)(b) QD states that “particularly cruel actions, even if commit-

ted with an allegedly political objective, may be classified as serious non-political crimes.¹⁷³ It would appear that the provision only addresses the second category, the purely non-political crimes. But we should observe that this phrase is the partial incorporation of Article 5.3 of the 1996 Joint Position that read:

“The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators.”

The first part of this Article addresses the third, intermediate category of crimes, the second clause exempts the (second) category of purely non-political crimes from balancing. The occurrence of the second clause in Article 12(2)(b) QD reveals the implicit acknowledgement that balancing is inherent to Article 1F(b) RC – otherwise the phrase would have no meaning.

Subsidiary protection

[339] The arrangement in Article 17(1)(a)-(c) and (2) QD for exclusion from being a person eligible for subsidiary protection¹⁷⁴ is identical to the one in Article 12 QD, except for one important aspect. Article 17(1)(b) stretches the ground of Article 1F(b) RC considerably, as it stipulates exclusion of any person who “has committed a serious crime”, i.e. either political or non-political, and apparently, either before or after the grant of subsidiary protection status (cf. Article 12(2)(b) QD). Further, Member States “may” (not must) exclude a person who prior to his admission committed some other crime “which would be punishable by imprisonment, had they been committed in the Member State concerned” and if the person left his country “solely” in order to avoid sanctions “resulting from those crimes”.¹⁷⁵ The open definition leaves space for disharmony between the Member States, as penalisation by imprisonment has not yet been harmonised.

Temporary protection

[340] Article 28(1) TPD allows for, but does not require exclusion from protection on the grounds meant in Article 1F RC. Article 28(2) TPD offers two rules for application of this exclusion ground, that do not appear in the Qualification Directive. First, exclusion “shall be based solely on the personal conduct of the person concerned”. Are we to understand that the person concerned should be personally involved in the commission of the act giving rise to application of the exclusion grounds? It follows from relevant rules of international law and

from state practice that the fact that an individual is a member of a certain government branch or an organisation involved in unlawful violence may give rise to the presumption that Article 1F RC applies.¹⁷⁶ If the individual could not rebut the presumption, Article 1F RC would apply although his “personal conduct” would arguably not be involved. Second, Article 28(2) TPD provides that “[e]xclusion decisions or measures shall be based on the principle of proportionality”. UNHCR labels the proportionality requirement as “a useful tool” for application of Article 1F RC, but considers that state practice is insufficiently settled to conclude that Article 1F RC requires it.¹⁷⁷

5.6.2 Article 33(2) RC

[341] Pursuant to Article 14 QD, Member States “may”, not must, “decide not to grant” refugee status “to a refugee” when “there are reasonable grounds for regarding him or her as a danger to the security of the EU Member State” where he or she is, or if he or she, “having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State”¹⁷⁸ - the grounds mentioned in Article 33(2) RC.¹⁷⁹ The provision does not further address in which cases it may apply, but according to the Preamble,

“The notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association”.¹⁸⁰

[342] Article 14(6) QD elaborates on the treatment of refugees to whom no status is granted, or whose status was revoked, ended or not renewed on the same grounds:

“Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State”.

Hence, pursuant to Article 14(6) such “persons” (refugees in the sense of Article 1 RC and of Article 2(c) QD) enjoy a sort of status (in the sense of a legally defined position) under the Common European Asylum System as they are entitled to the mentioned Convention rights. This “status” is not further elaborated upon. We may observe that Article 14(6) QD supposes “recognition” of these refugees, i.e. determination that the requirements of Article 2(c) QD are fulfilled, distinct from the “recognition of refugee status” as meant in Article 13 read in conjunction with 2(c) QD (see further paragraph 8.5).

[343] According to Article 17(1)(d) QD, the Member States must (not: may) exclude from subsidiary protection status any person who “constitutes a danger to the community or to the security of the country in which he or she is”.¹⁸¹ The provision is obviously moulded to Article 33(2) RC, but neither the standard of “reasonable grounds” nor the requirement of a final judicial conviction of a particularly serious crime applies. Hence, Member States have a great deal of discretion when they apply the provision - suspicion of criminal behaviour might be enough, and persons may constitute a danger because of petty crimes.

Article 28(1) TPD allows for exclusion from temporary protection any person to whom the grounds mentioned in Article 33(2) RC apply. Exclusion on these grounds is subject to the same rules on application as exclusion on the grounds meant in Article 1 F RC, discussed under number [340].

5.6.3 Article 1D and 1E RC

[344] Article 12(1) QD reproduces¹⁸² Article 1D and 1E Refugee Convention and hence excludes persons who are protected by UNWRA (i.e. Palestinians), and persons who acquired *de facto* citizenship in another state. There are no similar exclusion grounds for subsidiary and temporary protection. Surprisingly, then, the scope of subsidiary protection is broader in this respect.

A partial explanation for this asymmetry may be that in practice, one of the safe third country exceptions may apply. In particular, the application by a person who acquired *de facto* citizenship in another state would be inadmissible pursuant to Article 26 first clause and under b PD (the “country of first asylum” exception, see paragraph 7.5.3). Whether the claim for refugee protection is well-founded, including application of Article 1E, will then not be considered (see further under number [427]). Moreover, Article 4(3)(e) QD states that when assessing applications for Directive refugee protection or subsidiary protection, Member States should take into account *inter alia* “whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.” This provision may in fact function as the counterpart of Article 12(1) QD for subsidiary protection. As to refugee protection, Article 4(3)(e) QD can not apply in case Article 1E RC does not apply – for the latter provision defines when a person cannot qualify for refugee status on account of protection from another state than the one of his nationality (or habitual residence).¹⁸³

As to Article 1D RC, Hathaway observes that the “wholesale exclusion [of Palestinian refugees] is inconsistent with a commitment to a truly universal

protection system”,¹⁸⁴ and hence to object and purpose of the Refugee Convention. It appears indeed that several Contracting states to the Refugee Convention do not apply Article 1D RC for these, or similar reasons.¹⁸⁵ Maybe we should assume that the drafters of the Qualification Directive felt the same and, while unwilling to depart from the explicit Refugee Convention provision on Palestinians, therefore did not exclude them from subsidiary protection.

5.6.4 Conclusion

[345] The grounds for exclusion from Directive refugee as well as subsidiary and temporary protection are inspired by the Refugee Convention. Whereas the grounds for exclusion from refugee and temporary protection quite narrowly follow the Refugee Convention, those for subsidiary protection are far broader. But not in every respect, for the Qualification Directive does not contain exclusion grounds equivalent to Article 1D and 1E RC for subsidiary protection. That a similar exclusion ground is absent from the Temporary Protection Directive does not come as a surprise: application requires examination of individual circumstances, which temporary protection envisages postponing.

The Qualification and Temporary Protection Directives hardly offer guidance for interpretation or application of the Refugee Convention provisions on exclusion, but where they do, they diverge. Important, finally, is the distinction between obligation and competence to exclude. Most notably, when the grounds meant in Article 1F RC apply to a person, the Member States must exclude that person from both refugee and subsidiary protection status. When the grounds meant in Article 33(2) RC apply to a person, the Member States must exclude him from subsidiary protection, and may exclude him from refugee protection. There is no obligation to exclude persons to whom Article 1F or 33(2) RC applies from temporary protection.

5.7 Cessation and withdrawal

[346] The Qualification Directive lists three types of grounds for termination (“revocation”, “ending” or “refusal to renewal”)¹⁸⁶ of Directive refugee status or subsidiary protection status: exclusion, cessation and fraud. The first type, exclusion grounds, has been discussed in the preceding paragraph.¹⁸⁷

As to the second type, the Directive draws a remarkable distinction

between cessation of refugee and of subsidiary protection status. According to Article 11(1)(a-f) QD, a person “shall cease to be a refugee” if one of the grounds mentioned in Article 1C(1-6) RC applies.¹⁸⁸ For subsidiary protection, the Directive gives only one cessation ground, Article 16(1) QD: a person

“shall cease to be a person eligible for subsidiary protection when the circumstances, which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required”.¹⁸⁹

This cessation ground combines Article 1C(5) and (6) RC (Article 11(1)(e) and (f) QD). Should we infer that the Directive does not allow for cessation of subsidiary protection in cases where the beneficiary availed himself of the protection of his country of origin or a new country as required by Article 11(1)(a-d) QD and Article 1C(1-4) RC for Directive refugee status?¹⁹⁰ This is hardly likely. Maybe the drafters felt that Article 16(1) QD encompasses the last mentioned circumstances. But this renders an odd asymmetry: the terms cessation or change of circumstances in Article 16(1) QD have a far wider scope than identical or similar terms in Article 11 QD.

Guidance on the application of the cessation clauses is offered by Article 11(2) and 16(2) QD. When considering cessation on the grounds mentioned in Article 11(1)(e) or (f) QD (Article 1C(5) or (6) of the Refugee Convention),

“Member States shall have regard to whether the change of circumstances are of such a profound and durable nature that it eliminates the refugee’s well-founded fear of being persecuted”.

This clause seems to incorporate paragraphs 135 and 136 of the UNHCR Handbook.

[347] Thirdly, Member States must terminate Directive refugee or subsidiary protection status if “misrepresentation or omission of facts [...] were decisive for the granting of the status”.¹⁹¹ This ground, though not explicitly mentioned in the Refugee Convention, is quite compatible with it: if a person was recognised on the basis of false evidence, he never was a Convention refugee.

Finally, the Qualification Directive contains a rule on the burden of proof in case of withdrawal of status. According to Article 19(4) QD, the state has to “demonstrate” whether any of the termination grounds applies to the subsidiary protection beneficiary. Article 14(2) QD also shifts the burden of proof to the state, but only as far as cessation of refugee status in accordance with Article 11 is concerned. Apparently, as far as termination of refugee status in connection with the exclusion grounds or fraud is concerned, the “normal” burden of proof of Article 4(1) QD applies.¹⁹² The odd consequence of this is

that subsidiary protection beneficiaries suspected of fraud or commission of a crime have a better position than recognised Directive refugees do.

[348] Temporary protection “shall come to an end” either when the maximum duration has been reached, or before that moment, when the Council decides so.¹⁹³ The Temporary protection Directive does not address cessation of the protection in individual cases. But obviously, a Member State may terminate temporary protection if it is established that the person concerned does not belong to the protected group, i.e. in case of fraud.

5.8 The relation between the CEAS protection statuses

[349] In the previous paragraphs, I analysed the definitions of persons eligible for refugee, subsidiary and temporary protection status in some detail. On the basis of this analysis, we can now turn to the relation between these statuses. This relation begs two questions.

First, the differences in the personal scope of these three statuses. Subsidiary protection is “subsidiary”, that is, secondary or complementary to refugee status: according to element [5] of the definition of persons eligible for subsidiary protection, it applies only to persons who do not qualify as refugees (see number [274]). This complementary nature presupposes that its personal scope is, at least in certain respects, wider than the scope of Directive refugee status – if not, this status would never apply. Temporary protection applies in cases of mass influx, “in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation”.¹⁹⁴ This status hence serves “in particular” to postpone the examination of applications for refugee and subsidiary protection. It can fulfil this objective only if its personal scope is wider than the scope of persons entitled to refugee status and subsidiary protection – otherwise, the Member States would have to examine the claims for these statuses of persons who do not qualify for temporary protection. In paragraph 5.8.1 I address the question of whether the definitions of subsidiary and temporary protection beneficiaries do indeed secure that these statuses serve this purpose.

Second, the hierarchy among CEAS statuses. European asylum law makes the hierarchy among the statuses only partially explicit; in some instances, persons may enjoy different statuses at the same time. Hierarchy and concurrence of the statuses is relevant because the sets of secondary rights that are attached to them differ (see Chapter 8). Whether and if so, to what extent the requirements

for qualification for the various CEAS protection statuses establish a hierarchy and allow for concurrence will be discussed in paragraph 5.8.2.

5.8.1 The complementary character of subsidiary and temporary protection

[350] The definitions of “refugees”, of “persons eligible for subsidiary protection” and of persons eligible for “temporary protection” have more in common than appears from their wording. This holds true most obviously for the definitions of refugees and of persons eligible for subsidiary protection. In Article 2(c) and 2(e) QD, only one element is phrased in identical terms, “protection” (element [2b] in the definitions, see paragraph 5.2 and 5.4.3 above). The provisions elaborating this element, Articles 7 and 8 QD, apply to both forms of protection. Although the element alienage (number [3]) is phrased in different terms the two definitions, there is no difference in its application (Articles 4(3)(d), 5 and 20(6) and (7) QD). Likewise, the regulation on agents of harm and agents of protection is identical (Articles 6 and 7 QD). As far as these elements are concerned, the personal scope of refugee and subsidiary protection as defined by European asylum law is identical.

[351] The definitions for Directive refugees and persons eligible for subsidiary protection differ as regards the three elements of risk [1], harmful acts [2a], persecution grounds [2c], and exclusion [4]. As to the element risk, to subsidiary protection the “real risk” criterion applies; to refugee status, “well-founded fear”. The rules for risk assessment in Article 4 QD apply to both categories, and hence will level down differences the two standards. Article 15(c) QD provides for a major complication, as it modifies the risk criterion: for the specific type of harm it defines, not real risk but merely a “serious and individual threat” must be shown (number [305]). But as the Directive does not elaborate on the level of risk required by the well-founded fear criterion, it is hard to say whether the definition of subsidiary protection is more restrictive in this respect than the one for refugee protection, or *vice versa*.

The element of harmful acts (number [2a] in the definitions) brings about an important distinction between Directive refugees on one and persons eligible for subsidiary on the other hand. Serious harm in the latter definition concerns only the right to life or person. “Persecution” on the other hand can concern also other human rights.

The regulation of exclusion and cessation, finally, is somewhat confused.

Grounds for exclusion and cessation from refugee status are identical to those set out in Articles 1C – 1F and 33(2) RC. As to subsidiary protection status, the grounds for exclusion are wider, but the grounds for cessation are more stringent than the grounds that apply to refugee status: counterparts of Article 1C(1)-(4), 1D and 1E RC for cessation of subsidiary protection status are absent. Cessation of subsidiary protection status on similar grounds may however be possible on other bases (see number [346]).

[352] In which respects, then, is the scope of subsidiary protection wider than the scope of refugee protection, and does it indeed cater for complementary protection? First, no nexus with a persecution ground is required for qualification for subsidiary protection status. We should observe that the more restrictively the requirements on this nexus are applied, the greater the relative importance of subsidiary protection will be. Secondly, the ambiguous provision Article 15(c) QD may require subsidiary protection of persons who fulfil all requirements of the refugee definition, but fail to substantiate well-founded fear. Thirdly, and perhaps most importantly, we may note that the definition of subsidiary protection status is moulded to a considerable extent by the prohibition of *refoulement* ex Article 3 ECHR. This makes subsidiary protection subject to the dynamics of the interpretation of the latter provision by the European Court of Human Rights.

[353] How does temporary protection relate to refugee and subsidiary protection? As far as the Temporary Protection Directive elaborates on the matter, its definition of “harmful act” and of “protection” (elements [2a] and [2b]) are broader than those applicable to refugee and subsidiary protection. The same holds true for the risk criterion (element [1]) in Article 2(c)(ii) TPD, “serious risk”. It was observed that this criterion comes close to the criterion applied under Article 15(c) QD, which similarity may play a role for temporary protection beneficiaries applying for subsidiary protection (number [306]). The grounds for exclusion and cessation are more stringent. Only for risk of harm arising *sur place* does the Temporary Protection Directive seem to offer less protection, as we saw. Hence, apart from the latter issue, temporary protection is capable of encompassing the full scopes of both subsidiary and refugee protection.

5.8.2 Hierarchy and concurrence

[354] According to the Preamble to the Qualification Directive,

“The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees”; accordingly,

“[s]ubsidiary protection should be complementary and additional to the refugee protection enshrined in the [Refugee] Convention.”¹⁹⁵

Consequently, Article 2(e) QD states that one can qualify for subsidiary protection only when one “does not qualify as a refugee” (element [5] of the definition, see number [275] above). Concurrence of Directive refugee and subsidiary protection is therefore excluded. It follows from the quoted Preamble recital that “qualification as a refugee” means here qualification as a refugee in the sense of Article 2(c) QD or 1 RC, not qualification as a refugee “in accordance with Chapters II and III” QD as meant in Article 13 QD. The former group of refugees is larger than the second one to the extent, that the Qualification Directive does not harmonise qualification for refugee status to the standards of Article 1 RC.

[355] But do the rules on qualification indeed secure the primary position of refugee status? We saw that the Qualification Directive rules on the nexus with Convention grounds are overly restrictive, and that acknowledgement of the (eventual) existence of group persecution is absent. A nexus with Convention grounds is not required for subsidiary protection, and Article 15(c) QD addresses a form subsidiary protection where, arguably, only a limited degree of individualisation is required. In both instances, the grant of subsidiary protection as required by the Qualification Directive may result in unwillingness of Member States to extend the scope of refugee protection beyond the obligations set out in the Directive, but in accordance with their obligations under the Refugee Convention.¹⁹⁶ We will see in the next Chapter that if domestic law entitles subsidiary protection beneficiaries to the same secondary rights as Directive refugee status, the applications for refugee status by those beneficiaries (or their appeals against refusal of refugee status) may be declared inadmissible for lack of interest (see number [428] and [422] below). Thus, the grant of subsidiary protection status may bar examination of the application for refugee status. Hence, under the CEAS, subsidiary protection may take the place of refugee protection for Convention refugees; the primary position of refugee status is only partially secured.

[356] As to concurrence of applicant status with refugee and subsidiary protection status, the former ends when refugee status is granted (cf. par. 4.7).

During the examination of their request for protection, persons eligible for subsidiary protection are entitled to applicant status, as we saw above. This means that persons can be both applicants and subsidiary protection beneficiaries. This will occur when upon a request for refugee protection, subsidiary protection has been granted. When appealing against the decision to refuse the grant of refugee status, the third country national enjoys both applicant as well as subsidiary protection status.

Temporary protection may concur with both refugee and with subsidiary protection. For during temporary protection the Member States may process requests for both forms of protection, but the grant of one of these statuses does not end the temporary protection (see number [348] on cessation of temporary protection).

[357] The relation between temporary protection status and applicant status is only very partially elaborated in the CEAS. Beneficiaries of temporary protection must have the opportunity to lodge an application for asylum.¹⁹⁷ This provision apparently presupposes that temporary protection beneficiaries may not yet have lodged a request for asylum. But these persons necessarily lodged some kind of request for protection. For the Council decision installing temporary protection does not name the individual beneficiaries,¹⁹⁸ and it is unlikely the Member States will grant the status without some sort of request.

This begs the question of how the request for temporary protection must be qualified. As we saw above, any request for protection has to be treated as a request for protection as a refugee, unless the requested state runs a specific procedure for other forms of protection and the individual explicitly requests such alternative protection (number [264]). Hence, in principle¹⁹⁹ any temporary protection beneficiary is an applicant for asylum for the purposes of the Dublin Regulation and the Procedures Directive. The temporary protection beneficiary who enjoys applicant status cannot claim Reception Standards Directive benefits, as that instrument “shall not apply when the provisions of the [Temporary Protection Directive] are applied”.²⁰⁰

We may finally observe that temporary protection status has a declaratory nature – displaced persons to whom it applies are entitled to the benefits laid down in the Temporary Protection Directive from the moment temporary protection is introduced, because they fall within its scope. This means that when temporary protection is introduced, *all* applicants who claim that they fall within its scope must be treated in accordance with Temporary Protection Directive standards (obviously, until it has been ascertained they do not fall within the scope of the temporary protection).

For the sake of completeness, we should finally address the exceptional status for persons who qualify for refugee status for the purposes of Article 2(c) QD, but to whom Directive refugee status can be denied because an exception to the prohibition of *refoulement* meant in Article 33(2) RC applies (Article 14(6) QD; see number [342] above). It follows from Article 14(4) and (5) QD that this status cannot concur with refugee status granted pursuant to Article 13 QD. The persons concerned are obligatorily excluded from grant or renewal of subsidiary protection pursuant to Articles 17(1)(d) and 19(3)(a) QD, and may be excluded from temporary protection pursuant to Article 28(1) TPD. This status can therefore concur only with applicant status: during appeal against the negative decision on the request for Directive refugee status.

[358] In sum, Directive refugee status may concur only with temporary protection status. Subsidiary protection may concur with both applicant and with temporary protection status. Concurrence with temporary protection status may raise issues in so far as the latter status offers more favourable secondary rights than subsidiary protection. European asylum law does not acknowledge that, in most cases, temporary protection beneficiaries will by virtue of their request for temporary protection also be applicants. But it is to be doubted that this will raise practical problems, as temporary protection beneficiaries are explicitly excluded from the scope of the Residence Standards Directive.

5.9 Concluding remarks

[359] In the preceding paragraphs, I analysed the rules on qualification for refugee, subsidiary protection and temporary protection status, and to what extent they are in accordance with international asylum law. Findings on the various definition elements were summarised in concluding paragraphs. Can we draw general conclusions on the impact of this legislation on the legal position of persons in need of international protection? Three categories of issues can be distinguished.

First, a number of rules set standards that are compatible with international asylum law – for example Articles 6 QD (on agents of harm) and Article 10(2) QD (on the Convention ground “particular social group”). Article 15(c) QD, arguably, extends the scope of protection beyond the standards set by international asylum law. In this, the position of persons in need of protection is strengthened.

Second, a number of issues are not addressed, such as the risk standard of

“well-founded fear” and “compassionate grounds” cases under Article 3 ECHR. Provisions on other issues state no or hardly any rules that provide for meaningful protection, such as those on cessation and exclusion from refugee protection (Articles 11 and 12 QD). In this, the position of persons in need of protection remains unaffected.

Third, a number of provisions state or suggest standards that fall short of the level of protection required by international asylum law. Article 7(2) QD suggests an overly wide scope of agents of protection, Article 8(3) QD proposes an overly wide application of the internal protection alternative), and article 9(3) states overly restrictive rules on the causal nexus with the Convention grounds.

For a number of provisions, it is not clear at first sight whether they belong to the third or to the second category - the concept of group persecution, the risk standards set by Article 3 CAT and the definition of persecution acts in Article 9(1). This matter will be addressed in Chapter 9. Therein I will further address the questions of whether these provisions sort direct effect (and hence may be relied upon by individuals in court), whether the European Court of Justice can rule on the compatibility of the above-mentioned rules with international law and finally, whether rules that are not in accordance with international law affect the validity of the relevant legislation.

[360] Finally, it was further observed that European asylum law grants refugee status a primary position to the other statuses, but secures it only partially. Because of its secondary position next to refugee status, the practical meaning of subsidiary protection may be modest. Pursuant to Community legislation, its personal scope exceeds the scope of refugee protection, as no nexus with some Convention ground is required. And arguably, its scope may be wider because of the lenient risk standard that applies to persons who fled “indiscriminate violence in situations of international or internal armed conflict” (Article 15(c) QD).

NOTES

- ¹ Preamble recitals (2), (8), (15) and (17), and Articles 9(1) and 14(6) QD. Even more explicit is the definition of “refugee” in Article 2(f) of the Procedures Directive: “‘*Refugee*’ means a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Council Directive 2004/83/EC”, i.e. the Qualification Directive.
- ² Preamble recital (6) QD.
- ³ Article 63(2)(a) TEC, see number [195]; cf. Preamble recital (8) QD.
- ⁴ Preamble recital (9) QD.
- ⁵ Cf. number [297].
- ⁶ Explanatory memorandum to QD Proposal, p. 5.
- ⁷ Preamble recital (10) TPD.
- ⁸ Preamble recital (10) QD.
- ⁹ Cf. Preamble recital (22) TPD.
- ¹⁰ The [deleted] part states the same requirements for stateless persons: “[...] *and a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it [...]*”.
- ¹¹ Apart from, obviously, the limitation to non-EU citizens, addressed above under numbers [184] and [261].
- ¹² Article 2(a) TPD.
- ¹³ Article 2(c) TPD.
- ¹⁴ Article 5(1) and (2) TPD.
- ¹⁵ Article 6(1) TPD.
- ¹⁶ Article 2(e) QD, see par. 4.1 above.
- ¹⁷ Article 7(b) of the QD Proposal prescribed the “reasonable probability” test, apparently informed by relevant UK and USA case-law, cf. Battjes 2002, p. 163 and Hathaway 2003, p. 14.
- ¹⁸ Carlier 2005, under 1. B. 2) “Risque”.
- ¹⁹ See Carlier 2005, text accompanying footnote 34; Piotrowicz & Van Eck 2004, p. 113; Battjes 2002, p. 164.
- ²⁰ Cf. QD Proposal, Article 5(2): “*subsidiary protection shall be granted to any third country national [...] who, owing to a well-founded fear of suffering serious and unjustified harm set out in article 15 [...]*”.
- ²¹ Carlier 2005, under 1. B. 2) “Risque”.
- ²² HRC 30 July 1993, No. 470/1991 (*Kindler v. Canada*), par. 6.2.
- ²³ Steenbergen et al. 1999, pp. 175-6. Under Article 3 ECHR, unqualified “foreseeability” suffices, the Strasbourg case-law does not require that the consequence is “necessary” as well.

- ²⁴ Article 4(1) and (2) QD.
- ²⁵ Article 2(e) QD, cf. number [275] above.
- ²⁶ Article 3(1) CAT prohibits *refoulement* “where there are grounds” to believe that torture will ensue.
- ²⁷ Cf. Articles 4(2) QD, 4(3)(b) QD and 9A PD. The term “may” in Article 4(1) might seem to suggest otherwise, but see below in the main text.
- ²⁸ The provision seems to be inspired by pars 195-196 Handbook. The Comments on this provision in the QD Proposal does indeed refer to the UNHCR as a source of reference.
- ²⁹ But Articles 33A and 23(4)(i) PD in fact sanction belated applications, see numbers [429] and [431] below.
- ³⁰ Article 2(e) QD.
- ³¹ See number [15] above.
- ³² Cf. footnote 26 above.
- ³³ Article 30B(2) read in conjunction with 30B(1) and 30(1) PD.
- ³⁴ Article 4(1) QD.
- ³⁵ In the present paragraph I discuss the elements mentioned under Article 4(3)(a), (b) and (c) QD; those mentioned under Article 4(3)(d) and (e) will be addressed under numbers [335].
- ³⁶ Article 4(3)(b) and (c) QD; cf. UNHCR Handbook 1992, pars. 42 and 43.
- ³⁷ Cf. UNHCR Handbook 1992, par. 45.
- ³⁸ Preamble Recital (12) QD.
- ³⁹ The Comment on Articles in the QD Proposal observes that “*in assessing an application for international protection Member States should take into consideration: (a) the fact that the age and maturity of the child and his or her stage of development form part of the factual context of the application (b) the fact that children may manifest their fears differently from adults (c) the fact that children are likely to have limited knowledge of conditions in their country of origin (d) the existence of child specific forms of persecution, such as recruitment of children into armies, trafficking for sex work, and forced labour*” (QD Proposal, Comment on Articles ad 7(d) (old, now Article 4(3)(c) QD), p. 15).
- ⁴⁰ Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, OJ [1996] L63/2 (cf. number [45]), Article 2: “*In practice it may be that a whole group of people are exposed to persecution. In such cases, too, applications will be examined individually, although in specific cases this examination may be limited to determining whether the individual belongs to the group in question.*” Cf. Hathaway 2003, p. 14. See for an argument that Article 1A(2) RC is not only capable of addressing group persecution but rather meant to do so Spijkerboer 2002, pp. 25-29. See in this context also UNHCR 2005, Comments on Article 15.
- ⁴¹ Cf. UNHCR Handbook 1992, pars. 193f.

- ⁴² UNHCR Handbook 1992, pars. 204-205.
- ⁴³ Cf. Hathaway 1991, p. 72, Spijkerboer & Vermeulen 1995, pp. 61-2.
- ⁴⁴ Cf. UNHCR Handbook 1992, par. 196; Carlier 2005, under 1. B. 3) “Preuve”.
- ⁴⁵ Carlier 2005, under 1. B. 2) “Risque”; Gorlick 2003; cf. Goodwin-Gill 1996, pp. 34f.
- ⁴⁶ Article 5 TPD.
- ⁴⁷ Article 2(c)(i) TPD. The Dutch language version speaks of persons who “*hebben moeten vluchten*”, i.e. who *had to* flee. This implies a certain risk criterion. As the French, German and Italian language versions corroborate the English version, the Dutch version apparently contains a translation error – maybe due to contamination with the first part of Article 2(c) TPD that speaks of displaced persons as persons “who have had to leave” their country.
- ⁴⁸ Article 2(c)(ii) TP
- ⁴⁹ Cf. Article 4(4) QD, number [282].
- ⁵⁰ Cf. UNHCR Handbook 1992, par. 51; 1996 Joint Position point 4.
- ⁵¹ Spijkerboer & Vermeulen 1995, p. 108; Article 31(1) RC, prohibiting penal sanctions for refugees who came directly from a place where “their life or freedom were threatened” reinforces this reading (ib., pp. 108-109).
- ⁵² As to state practice, see Vanheule 1997, pp. 98-102; UNHCR Handbook 1992, par. 51; Spijkerboer and Vermeulen 2005, pp. 33-34 and 1995, pp. 108-9 with references to other authors.
- ⁵³ Cf. UNHCR Handbook 1992, par. 51 speaks of “serious violations”.
- ⁵⁴ Cf. the first recital of the Preamble, quoted under number [558].
- ⁵⁵ International Covenant on Economic, Social and Cultural Rights, UNGA Res 220 A (XXI), 16 December 1966, 993 UNTS 3.
- ⁵⁶ Hathaway 1991, pp. 105-108. The UNHCR Handbook 1992, par. 60 mentions the Covenant as an instrument to which “in particular” recourse may be taken to determine persecution.
- ⁵⁷ Cf. Hathaway 1991, pp. 109-111. He distinguishes as a fourth category of rights recognized in the UDHR, but laid down in neither of the mentioned Covenants; for present purposes, the tripartition as set out (merging Hathaway’s third and fourth category) will suffice. Spijkerboer and Vermeulen classify human rights not on a formal, but on a thematic basis, which yields a result close to but not identical to the first three categories identified by Hathaway: (1) “basic human rights” constituting “primary physical conditions” for existence; (2) classical political rights and prohibition of discrimination; and (3) economic, social and cultural rights (Spijkerboer & Vermeulen 2005, pp. 33-34 and 1995, pp. 110-115).
- ⁵⁸ Cf. Article 4(2) CCPR.
- ⁵⁹ Hathaway 1991, pp. 109-110; Spijkerboer & Vermeulen 1995, p. 114; Haines 2003, pp. 328-9.
- ⁶⁰ Cf. Handbook 1992, par. 53.
- ⁶¹ Vanheule 1997, 98-102.
- ⁶² Where the English language version speaks of “serious” (in Article 9(1)(a) QD) and “severe” (under (b)), other language versions apply the same term in both subparagraphs

(“*ernstig*” in the Dutch one, “*grave*” in the French). Hence, “serious” and “severe” should not be read as different scales.

- ⁶³ UNHCR points out in its Comments on the provision that discriminatory acts with sufficiently severe consequences could also constitute persecution, suggesting that the definition is overly strict (UNHCR 2005, Comments on Article 9(1)). However, discrimination could arguably qualify as a violation of the human right laid down in Article 26 CCPR. Article 9(2)(b) QD seems to acknowledge this as it refers to discrimination that amounts to persecution (see the following number).
- ⁶⁴ Articles 2, 3, 4(1) and 7 ECHR.
- ⁶⁵ Cf. Articles 4 read in conjunction with 16 and 18 CCPR.
- ⁶⁶ Spijkerboer 2002, p. 35-36.
- ⁶⁷ Par. 169.
- ⁶⁸ Par. 170.
- ⁶⁹ Cf. Vedsted-Hansen 2002, pp. 68-70 on the QD Proposal, and UNHCR 2005, Comments on Article 9(2) QD.
- ⁷⁰ Preamble Recital (25) QD.
- ⁷¹ Cf. number [16].
- ⁷² The Explanation to the draft of the present version of Article 15(a) QD does not allude to the Charter; it merely states that there was “*consensus among Member States that persons facing such a risk should be granted subsidiary protection, provided that they cannot be excluded*” (emphasis added, HB; Council doc. 12148/02, Asile 2002/43, 20 September 2002, p. 5).
- ⁷³ According to the Explanations to the draft of Article 15, the second ground “has been taken from the language used by the European Court of Human Rights in its rulings relating to Article 3 ECHR” (Council doc. nr. 12148/02, Asile 2002/43, Brussels 20 September 2002, p. 5).
- ⁷⁴ According to Piotrowicz & Van Eck 2004, p. 121 however it would have been desirable to add the term “cruel” to Article 15(b).
- ⁷⁵ Noll 2002, p. 187.
- ⁷⁶ Cf. ECtHR 7 July 1989, Ser. A vol. 161 (*Soering v. United Kingdom*), par. 91, confirmed in ECtHR 21 November 2001, Rep. 2001-XI (*Al-Adsani v. UK*), par. 39 and ECtHR (Grand Chamber) 4 February 2005, Appl. No. 46827/99 and 46951/99 (*Mamatkulov and Askarov v. Turkey*), par. 67.
- ⁷⁷ ECtHR 2 May 1997, Rep. 1997-III (*D v. UK*), pars. 49 and 54.
- ⁷⁸ ECtHR 24 June 2003, Appl. No. 00013669/03 (decision) (*Arcila Henao v. the Netherlands*), under “The Law”.
- ⁷⁹ The Explanation to the draft of the present text version of Article 15(b) QD explicitly states that the requirement that the ill-treatment occur in the country of origin serves “to avoid the inclusion of such compassionate grounds cases” as *D v. UK* (Council doc nr. 12148/02, Asile 2002/43 of 20 September 2002, p.6).

⁸⁰ It was introduced with reference to Article 15(b) QD in Council doc. 13354/02, Asile 2002/55 of 23 October 2002 p. 3, but without the words “on a discretionary basis”, which were added in Council doc 14083/02, Asile 2002/63 of 12 November 2002, n26. Member States have no discretion when compassionate grounds cases fall within the scope of Article 3 ECHR. Hence, the term “on a discretionary basis” removes compassionate grounds cases within the ambit of Member States’ obligations under Article 3 ECHR from the ambit of the recital, and renders the recital irrelevant for assessing the relation between Article 3 ECHR and Article 15 QD.

⁸¹ See Noll 2000, pp. 372-377 for a discussion.

⁸² Piotrowicz & Van Eck 2004, p. 134 advocate that the scope of subsidiary protection should be inspired by Common Article 3 – but as it appears, by its full range, not merely by its stipulation concerning “life and person”.

⁸³ The Draft version of Article 15(c) in doc. nr. 13354/02, Asile 2002/55, 23 October 2002 run as follows: “*in accordance with the 1949 Convention relating to the Protection of Civilian Persons in time of War, serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict*”.

⁸⁴ “[Article 15(a) and (b)] would in all cases appear to cover applicants facing a serious threat to life or physical integrity. However, threats arising in situations of indiscriminate violence, would not be covered since such situations can not be described as treatment or punishment or suffering the death penalty. Hence, a separate subparagraph has been drafted in order to include this situation” (Council doc. nr. 12148/02, pp. 6-7). The Explanations continue as follows: “*This would simultaneously be in line with the jurisprudence of the ECHR relating to Article 3 ECHR, namely as was indicated in [Vilvarajah], that an expulsion as such to a situation with a high level of danger and insecurity/indiscriminate violence could be considered an inhuman or degrading treatment. [Footnote:] In [Vilvarajah] the Court stated that it would not exclude the possibility of applying the principle of non-refoulement in a situation where a country would seek to expel an individual to a country where a high level of insecurity prevailed*” [emphasis added, HB; *ibid.*, p. 7]. So it appears that according to the drafters, indiscriminate violence could after fall within the scope of Article 3 ECHR – in contradiction to the former statement. We may further observe that in the *Vilvarajah* judgement (ECtHR 30 October 1991, Ser. A vol. 215), the Court addressed the risk of ill treatment upon return to Sri Lanka, not the “*expulsion as such*”. Moreover, in *Vilvarajah* the Court did (and could) obviously not “*exclude the possibility*” of a risk of ill-treatment in a country where “*high level of insecurity prevailed*”. But the very gist of that judgement is that this high level of insecurity is not enough for considering the risk of ill-treatment as “*real*”. Rather, the European Court of Human Rights required a quite strict degree of individualisation of the risk of ill-treatment: the applicants should have showed “*special distinguishing features in their cases that could [...] have enabled*” the authorities of the expelling state to foresee that they would be ill-treated. (*Vilvarajah*, par. 112). As the

purport of this statement in the Council document is hence utterly unclear if correct at all, I leave it further out of account.

- ⁸⁵ In *D v. UK*, par. 49, the Court observed that ill-treatment in the receiving country may stem “from factors which [...] engage either directly or indirectly the responsibility of the public authorities of that country”, and this direct responsibility is engaged in case of “intentionally inflicted acts of the public authorities” (emphasis added, HB).
- ⁸⁶ UNHCR points out in its Comments to the provision that persons who have fled situations of indiscriminate violence likewise might qualify for refugee status (Comments to Article 15 and to Preamble recital (26) QD, cf. number [303] below).
- ⁸⁷ If I see it correctly, *Carlier* comes to the same conclusion, though on different grounds (*Carlier* 2005, under I.B.1.a) 1) *atteintes graves*). The French asylum appeals body *Commission des Recours des Réfugiés* however has held that Article 15(c) Qualification Directive only applies when an expulsion would be contrary to Article 3 ECHR, thus implying that Article 15(c) has no added value compared to Article 15(b); CRR 25 June 2004, (*Mme Koffi Amani*), *Contentieux des réfugiés* 2-2004, p. 24-25.
- ⁸⁸ Cf. Noll 2002, pp. 184f states that the Community is not competent to legislate on protection outside the scope of international law.
- ⁸⁹ Spijkerboer 2002, pp. 31-2.
- ⁹⁰ Cf. Article 5(3) TPD.
- ⁹¹ Vermeulen et al. 1998, p. 7f.
- ⁹² Noll 2000, pp. 515-521; Vermeulen et al. 1998, pp. 7f.
- ⁹³ The same follows from Article 33(1) RC – Noll 2000, p. 515.
- ⁹⁴ Noll 2000, pp. 519-520, with references to case law.
- ⁹⁵ ECtHR 7 July 1989, Ser. A vol. 161 (*Soering v. United Kingdom*), par. 91, confirmed in ECtHR 20 March 1991, Ser. A vol. 201 (*Cruz Varas*), par. 69, ECtHR 30 October 1991, Ser. A vol. 215 (*Vilvarajah*), par. 107 and ECtHR 21 November 2001, *Rep.* 2001-XI (*Al-Adsani*), par. 39.
- ⁹⁶ Cf. *Soering*, par 91; *Vilvarajah*, par. 103.
- ⁹⁷ ECtHR 2 May 1997, *Rep.* 1997-III (*D v. UK*), par. 49.
- ⁹⁸ Cf. ECtHR 15 November 1996, *Rep.* 1996-V (*Chahal*), par. 105; ECtHR 29 April 1997, *Rep.* 1997-III (*H.L.R.*), par. 40.
- ⁹⁹ ECtHR 17 December 1996, *Rep.* 1996-VI (*Ahmed*), pars. 35 and 47.
- ¹⁰⁰ CaT 15 May 2001, CAT/C/22/D/49/1996 (*S.V. v. Canada*), par. 9.5. It appears that in this view the Committee silently retracts from its earlier statement in *Elmi v. Australia*, where it considered as follows: “for a number of years Somalia has been without a central government [...] some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of

the Convention, within the phrase “public officials or other persons acting in an official capacity” contained in article 1” (CaT 14 May 1999, CAT/C/22/D/120/1998, par. 6.5).

¹⁰¹ See Spijkerboer, *ibid.* I have no information on the ten Member States that acceded on 1 May 2004.

¹⁰² Spijkerboer 2002, pp. 32-33, Bouteillet-Pacquet 2002, pp. 233-236.

¹⁰³ Article 6 QD is therefore more inclusive than the 1996 Joint Position, which addressed only situations (1), (2) and (3): “Persecution by third parties will be considered to fall within the scope of the Geneva Convention where it is based on one of the grounds in Article 1A of that Convention, is individual in nature and is encouraged or permitted by the authorities. Where the official authorities fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light in particular of whether or not the failure to act was deliberate. The persons concerned may be eligible in any event for appropriate forms of protection under national law”. The QD Proposal stated in Article 12(2)(a) QD that “it is immaterial whether the persecution stems from the State, parties or organisations controlling the State, or non-state actors where the State is unable or unwilling to provide effective protection”.

¹⁰⁴ Spijkerboer 2004, p. 179.

¹⁰⁵ In the same vein UNHCR 2005, Comments on Article 7(2).

¹⁰⁶ Cf. Hathaway 2003, p. 15.

¹⁰⁷ Preamble recital (19) QD.

¹⁰⁸ Article 7(3) QD; cf. the statement in the Minutes of the 2579th meeting of the Council of the European Union at 29 and 30 April 2004, Council doc. nr. 8990/04 ADD 1 REV 1, p. 9.

¹⁰⁹ Hathaway 2003, pp. 15-16, with references to relevant case law to this extent from Canada and the United Kingdom.

¹¹⁰ Not only for the purposes of Article 1A(2) RC, but also for those of Article 7 QD, as this provision treats “protection” and “actors of protection” as separate issues.

¹¹¹ Cf. Oxford English Dictionary, mentioning “*The territory or land of a nation; usually an independent state*” under 3. after a.o. “*A tract or expanse of land of undefined extent*”. The same holds true for the French language version “*pays*” as opposed to “*état*”, and the Dutch “*land*” as opposed to “*staat*”.

¹¹² The Refugee Convention employs the term “state” exclusively for Contracting states – with one exception: Article 8 prohibits exceptional measures to be taken against the refugee who “*is a national of [a foreign] State*”, that is, his “*the country of his nationality*”. Elsewhere, the Refugee Convention the term “*countries*” where not or not exclusively the Contracting states are meant, but occasionally, the instrument refers to the Contracting states as “*countries*”, where it speaks of “*country of residence*” (for example Articles 14 first clause and 17(2) RC).

¹¹³ Cf. Articles 31 and 33 RC.

¹¹⁴ ECtHR 29 April 1997, *Rep.* 1997-III (*H.L.R. v. France*), par. 40, repeated in ECtHR 22 October 2002, Appl. No. 60959/00 (*Ammari v. Sweden*), under “*The Law. B*”.

- ¹¹⁵ ECtHR 19 February 2004, Appl. No. 14513/03 (*Sadeta Muratovic v. Denmark*), under “*The Law*”.
- ¹¹⁶ *Muratovic*, under “*A. The circumstances of the case*”.
- ¹¹⁷ Hathaway & Foster 2003, pp. 365-381. They also discuss alternative readings of the term “protection”, as well as the alternative basis for internal protection assessment in Article 1A(2) RC, “well founded fear”.
- ¹¹⁸ Hathaway & Foster 2003, pp. 367-370, and cf. UNHCR 2005, Comments on Article 8.
- ¹¹⁹ Hathaway & Foster 2003, pp. 389-411.
- ¹²⁰ Hathaway & Foster 2003, p. 392.
- ¹²¹ Hathaway & Foster 2003, p. 405. As to their argument based on ECtHR 15 November 1996, *Rep.* 1996-V (*Chahal v. UK*), see footnote 124 below.
- ¹²² ECtHR 6 March 2001, *Rep.* 2001-II (*Hilal*), par. 67.
- ¹²³ *Chahal*, pars. 99 and 104.
- ¹²⁴ The same holds true for *Chahal*, par. 103.
- ¹²⁵ Incidentally, these requirements are quite similar to those that apply to the safe third country exception - see number [519].
- ¹²⁶ Article 8(1) QD: “*As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.*”
- ¹²⁷ Cf. Hathaway & Foster 2003, pp. 390-392; cf. Hathaway 2003, p. 16; UNHCR 2005, Comments on Article 8.
- ¹²⁸ Cf. Hathaway & Foster 2003, pp. 411-415.
- ¹²⁹ Article 2(d) TPD; cf. Article 2(c)(i) TPD.
- ¹³⁰ Cf. 1996 Joint Position pars. 7.1, 7.4 and 7.5. - Article 10(1)(e) QD states the same as to “political opinions” in particular: “[...] *the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant*” [emphasis added, HB].
- ¹³¹ See Goodwin-Gill 1996, pp. 50-52, referring to the language employed in Article 1A(2) RC (“*for reasons of*” in stead of “*on account of*”), and to the preparatory works.
- ¹³² UNHCR Handbook 1992, par. 67.
- ¹³³ Article 10(1)(a) QD: “[...] *the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group [...]*”.
- ¹³⁴ Article 10(1)(b) QD: “[...] *the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious*

acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief [...]”.

¹³⁵ Article 10(1)(c) QD: “[...] *the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State [...]*”.

¹³⁶ Cf. Comment on Articles to the QD Proposal: “*Article [7, HB] owes much to the Geneva Convention and the Joint Position and does not seek to create any new reasons not explicitly or implicitly recognised by these instruments*” (Comment at Article 11, p. 21). The wording of Article 10(1)(c) QD is even identical to Article 7.3 of the 1996 Joint Position. Article 10(1)(a), (b) and (c) QD belong to the few proposed provisions that reached the adopted version unaltered.

¹³⁷ The Preamble remarks that “*it is [...] necessary to introduce a common concept of the persecution ground “membership of a particular social group” (recital 21), after having observed that “it is necessary to introduce common concepts of [...] persecution, including the reasons for persecution” (recital 18).*”

¹³⁸ Aleinikoff 2003, pp. 268-271, 275-280 and 294f. The test is advocated in academic literature by especially Hathaway (Hathaway 1991, pp. 157f).

¹³⁹ That homosexuality is indeed a property that a person cannot be expected to renounce rather than an innate characteristic for the purposes of Article 10 QD follows from the other part of Article 10(1)(d) QD; see number [329] below. - In the QD Proposal, the “common background” was mentioned among the properties that a person couldn’t be required to denounce (Article 12(d)).

¹⁴⁰ Cf. Aleinikoff 2003, pp. 277f.

¹⁴¹ The French Conseil d’État ruled that a particular social group exists “*en raison des caractéristiques communes qui les définissent aux yeux des autorités et de la société*” (23 June 1997, Decision No. 171858 (*Ourbih*), quoted in Aleinikoff 2003, p. 281); in *Islam and Shah* Lord Hope of Craighead stated that “*a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society*” (reprinted in IJRL 1999, p. 518). Goodwin-Gill appears to be supportive of the approach (Goodwin-Gill 1996, p. 46f).

¹⁴² It appears that the conjunction “and” does not appear between both indents of Article 10(1)(d) QD in the Swedish language version, but it does appear in the Dutch, English, French, German and Italian versions.

¹⁴³ Hathaway 2003, p. 17.

¹⁴⁴ Aleinikoff 2003, p. 300. If the characteristic is cognisable to the persecutor only, the determination of the particular social group and the persecution act tend to coincide which deprives the Convention ground of its meaning – an unreasonable result (cf. number [328]).

¹⁴⁵ Hathaway 2003, *l.c.*.

¹⁴⁶ Aleinikoff 2003, pp. 297-300.

- ¹⁴⁷ Cf. Hathaway 1991, p. 159, Aleinikoff 2003, pp. 285-6.
- ¹⁴⁸ The relevant statements are the result of a compromise. Article 12(d) QD Proposal defined “particular social group” as “a group which may be defined in terms of certain fundamental characteristics, such as sexual orientation, age and gender [...]”. In Council negotiations during the adoption, it appeared that some Member States wanted to delete these references to sexual orientation, age and gender, whereas other ones wanted to maintain them in the definition (cf. Council doc 121999/02, p. 15n).
- ¹⁴⁹ Article 10(1) “Member States shall take the following elements into account when assessing the reasons for persecution: [...] (e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant. 2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.”
- ¹⁵⁰ See Hathaway 1991, pp. 104-5 and 112; cf. Haines 2003, pp. 327-330 and Aleinikoff 2003, pp. 302-3. This view has explicitly been accepted by courts of the jurisdictions mentioned below.
- ¹⁵¹ Hathaway et al. 2004, under 6. UNHCR remarkably did not comment on Article 9(3) QD in UNHCR 2005.
- ¹⁵² See Aleinikoff 2003, pp. 302-3 and Haines 2003, p. 327n for references.
- ¹⁵³ Council of State 20 January 2004, *JV* 2004/98, par. 2.2.2; translation HB.
- ¹⁵⁴ The phrasing of the Council at times markedly deviates from the terms of the Refugee Convention (“based on” and “reduced” instead of “for reasons of”; cf. footnote 131), but the use of the term “persecution” (“vervolging”) instead of “being persecuted” does probably not render the Council’s particular view on the reading of Article 1A(2) RC, but merely repeats the official (but unauthentic) Dutch translation of the Refugee Convention (cf. *Tractatenblad* 1954, 88).
- ¹⁵⁵ Nor did it do so in any other judgement – cf. T.P. Spijkerboer in his annotation to the quoted judgement in *JV* 2004/98.
- ¹⁵⁶ Cf. Article 2(c) and (e) QD.
- ¹⁵⁷ See Hathaway 2003, pp. 14-15.
- ¹⁵⁸ Cf. Hathaway 2003, p. 14n.
- ¹⁵⁹ Article 2(c) TPD.
- ¹⁶⁰ Article 7(1) TP Directive: “Member States may extend temporary protection as provided for in this Directive to additional categories of displaced persons over and above those to whom the Council Decision provided for in Article 5 applies, where they are displaced for the same reasons and from the same country or region of origin.”

- ¹⁶¹ The wording “*excluded from being a refugee*” may seem somewhat odd. Article 14(1) Proposal QD read “*exclude from refugee status*”. As “*refugee status*” is “*recognition as refugee*” (Article 2(c)), and as this recognition is a “declaratory act” (Preamble recital (14) QD), unrecognised refugees fell outside the scope of Article 14(1) QD Proposal. - Another difference in wording is the substitution of “[...] *excluded from being a refugee* with respect to whom *there are serious grounds [...]*”, as Article 1F RC reads, by “[...] *excluded from being a refugee* where *there are serious grounds [...]*” in Article 12 QD (emphasis added, HB). But arguably, this difference in wording does not bring about a difference in meaning.
- ¹⁶² Article 12(2) QD: “*A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.*”
- ¹⁶³ The specification was initiated by France (cf. Council doc. 9038/02 Asile 2002/25 of 17 June 2002, p 20n), not surprisingly, as among the Member States, France appears to be the only Contracting state that applies Article 1F(c) on a more or less regular basis (cf. Kwakwa 2000, pp. 87 and 89-90).
- ¹⁶⁴ Cf. Article 5.4 1996 Joint Position: “*The purposes and principles referred to in Article 1F (c) are in the first instance those laid down in the Charter of the United Nations*”.
- ¹⁶⁵ UNHCR 2003, par. 17, UNHCR 2003a, par. 46; cf. Kwakwa 2000, p. 83.
- ¹⁶⁶ Article 12(3) QD.
- ¹⁶⁷ UNHCR 2003a, pars. 52-53, mentioning next to instigation “aiding or abetting”, cf. Article 25 of the Rome Statute of the International Criminal Court (adopted July, 17, 1998, UN Doc. A/CONF.183/9*, corrected Nov. 10, 1998 and July 12, 1998).
- ¹⁶⁸ Cf. UNHCR 2003a, par. 12.
- ¹⁶⁹ See Spijkerboer & Vermeulen 2005, pp. 99-100.
- ¹⁷⁰ Kälin 1982, p. 212.
- ¹⁷¹ Kälin & Künzli 2000, pp. 67-8 and UNHCR 2003a, pars. 81-82.
- ¹⁷² See UNHCR 2003a, pars. 41 and 81f with references to relevant case law, and Kälin & Künzli 2000, pp. 67-8.
- ¹⁷³ Article 12(2)(b) QD.
- ¹⁷⁴ Article 17(1) QD “*A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as*

defined in the international instruments drawn up to make provision in respect of such crimes; (b) he or she has committed a serious crime; (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present. 2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein [...].”

¹⁷⁵ Article 17(3) QD.

¹⁷⁶ Cf. UNHCR 2003, par. 19, UNHCR 2003a, pars. 57f with references to relevant treaties and case law.

¹⁷⁷ UNHCR 2003, par. 24, UNHCR 2003a, pars. 76f with references to relevant treaties and case law.

¹⁷⁸ Article 14(5) read in conjunction with 14(4) QD.

¹⁷⁹ Article 21 QD, on “Protection from *refoulement*”, contains an identical arrangement; see number [576].

¹⁸⁰ Preamble recital (28) QD – criticised in UNHCR 2005 as too broad.

¹⁸¹ Article 17(1)(d) QD.

¹⁸² Oddly, Article 12(1)(a) QD refers explicitly to Article 1D, whereas neither Article 12(1)(b) nor 12(2) QD refers to Article 1E or 1F RC.

¹⁸³ Likewise UNHCR 2005, Comments on Article 4(3).

¹⁸⁴ Hathaway 1991, p. 209.

¹⁸⁵ Cf. Takkenberg 1997, pp. 153f.

¹⁸⁶ Cf. Article 14 and 19 QD.

¹⁸⁷ Articles 14(3)(a) and (4), and 19(2) and (3)(a) QD. The grounds for ending statuses are obligatory or facultative on the same footing as the grounds for exclusion. Thus, termination on grounds inspired by Article 1F RC is obligatory (Article 14(3)(a), 19(3)(a)), on grounds inspired by Article 33(2) RC is facultative where Directive refugee status is concerned (Article 14(4)) but obligatory as to subsidiary protection (Article 19(3)(a)), and termination because of applicability of the grounds mentioned in Article 17(3) is facultative (Article 19(2) QD).

¹⁸⁸ Article 11(1) and Article 14(1) QD.

¹⁸⁹ Article 16(1) and 19(1) QD.

¹⁹⁰ According to Article 1C(1)-(4) RC a person ceases to be a refugee if “(1) *He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it, or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail*

himself of the protection of the country of his nationality; [...] (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence.”

¹⁹¹ Article 14(3)(b) and 19(3)(b) QD.

¹⁹² As far as it is compatible with Article 1F RC, of which the terms “*when there are serious reasons for considering that*” unequivocally places the burden on the state (cf. Article 14(2) and 17(1) QD).

¹⁹³ Article 6(1) TPD.

¹⁹⁴ Article 2(a) TPD.

¹⁹⁵ Preamble recitals (3) and (24) QD.

¹⁹⁶ Likewise UNHCR 2005, Comments on Article 15.

¹⁹⁷ Article 17(1) TPD.

¹⁹⁸ Article 5(3)(a) TPD speaks of a description of the “specific groups of persons” to whom the protection applies.

¹⁹⁹ In principle, for if the third country national explicitly requests for alternative forms of protection, and the requested Member State operates a separate system for them, the request for temporary protection is not an application for asylum.

²⁰⁰ Article 3(3) RSD. Oddly, its counterpart in the Temporary Protection Directive states that Member States “may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while applications are under consideration” (Article 19(1) TPD).

Chapter 6

Asylum procedures

In this chapter, I discuss rules of European asylum law on procedures on the granting and withdrawal of protection. Most rules on asylum procedures are laid down in the Procedures Directive, a few in the Dublin Regulation and the Temporary Protection Directive. Rules on withdrawal of secondary rights laid down in the Reception Standards Directive and rules on examination of requests for family reunification in the Family Reunification Directive will not be discussed here, but in connection with those secondary rights in Chapter 8.

In paragraph 6.2, I address the asylum procedures in first instance. Rules on appeal proceedings are discussed in paragraph 6.3; grounds for refusal in paragraph 6.4, and rules on procedures on withdrawal or termination of protection statuses in paragraph 6.5. In paragraph 6.1, I address some peculiarities of the scope of the Procedures Directive and its relation to other instruments that are relevant for asylum procedures.

6.1 Introduction

[361] At the outset, it should be observed that the reading of the Procedures Directive is complicated because of a number of incongruities that are due to the troublesome legislative history of that instrument. The original Commission Proposal presented on 24 October 2000¹ met so much opposition in the Council that the Commission was asked to redraft it.² The Amended Proposal, presented on 18 June 2002,³ was subject to further extensive debates in the Council; the initiative of Austria for a Council Regulation on the qualification of safe third countries,⁴ a matter also addressed by the Procedures Directive, may have complicated matters further. As a result, the Directive suffers from a number of inconsistencies that must be addressed in order to sort out the scope and content of this instrument.

[362] According to Article 1 PD, the purpose of the Procedures Directive is “to establish minimum standards on procedures in the Member States for granting or withdrawing refugee status.” Its rules apply to “applications for asylum”.⁵ Pursuant to this definition the personal scope may differ among the Member States (see number [263]). In Member States that run separate procedures for refugee protection and for other forms of protection, the Directive

applies only to the processing of the application for refugee protection,⁶ but in States that have a single procedure for refugee and subsidiary protection, the Procedures Directive also applies to requests for the latter form of protection.

Although the Procedures Directive does apply in some Member States to requests for subsidiary protection, several provisions such as the definition of the purpose of the instrument, refer to examination of the “qualification as a refugee” only.⁷ Should we assume that such provisions do not address the qualification of a person as eligible for subsidiary protection? The Directive explicitly addresses protection under instruments of international asylum law other than the Refugee Convention.⁸ And it would be unreasonable to assume that application of the Directive’s rules to requests for subsidiary protection serve, in the terms of Article 1 PD, only the purpose of setting standards on procedures for granting refugee protection. We must therefore assume that Procedures Directive provisions that refer to “qualification as a refugee by virtue of the Qualification Directive” only, may be equally applicable to “qualification as a person eligible for subsidiary protection status” in those Member States where the instrument also applies to procedures for the granting of subsidiary protection. This extensive reading accommodates both objectives of the Directive - observance of human rights, and preclusion of secondary movements (see paragraph 4.6).

[363] The Dublin Regulation and the Temporary Protection Directive also set some rules on procedures concerning the granting of international protection. How do these rules relate to the rules on procedures in the Procedures Directive?

Pursuant to the Dublin Regulation, the Member State where an application was lodged may decide that it will not “examine” the application when another state is “responsible” (see paragraph 7.2.1). This decision not to examine the claim is subject to some procedural rules in the Dublin Regulation.⁹ As a decision on an “application for asylum”, it also falls within the scope of the Procedures Directive.¹⁰ It would follow that all relevant Procedures Directive provisions apply to decisions to transfer the applicant pursuant to the Dublin Regulation (and hence not to examine the merits of the claim). However, the Preamble to the Procedures Directive states that “[t]his Directive does not deal with procedures governed by [the Dublin Regulation]”.¹¹ The Dublin Regulation makes a similar distinction in its definition of “examination”:

“‘examination of an asylum application’ means any examination of [...] an application for asylum by the competent authorities in accordance with

national law except for procedures for determining the Member State responsible in accordance with this Regulation”.¹²

So we must distinguish between two forms of examination. First, “examination” in the sense of “procedures for determining the Member State responsible in accordance with this regulation”, or allocation procedures. Second, “examination” in the sense of any other decision or ruling on the application (such as whether the claim is well-founded or not). Examination in the sense of allocation procedures is subject to the Dublin Regulation, the latter to “national law”.

Does it follow that procedures on application of the Dublin Regulation (the first type) fall outside the scope of the Procedures Directive? The Dublin Regulation “governs” these procedures only very partially. It does not address many issues that are regulated by the Procedures Directive, such as most of the procedural guarantees laid down in Chapter II PD (see paragraph 6.2.4). These matters are apparently left to the domestic law of the Member States, which in its turn is subject to relevant Procedures Directive rules.¹³ Hence, the Procedures Directive deals with transfer decisions according to the Dublin Regulation only *as far as* they are governed by the Dublin Regulation. Where the Dublin Regulation does not state rules, the Procedures Directive applies. The rules on procedures laid down in the Dublin Regulation will therefore be discussed in conjunction with those set out in the Procedures Directive (see numbers [371] and [425]).

[364] The Temporary Protection Directive states only a few procedural rules, which concern appeal against the denial of temporary protection (discussed under number [471]). A person within the scope of a decision establishing temporary protection will be an “applicant” for the purpose of the Procedures Directive, unless Member States establish a special procedure for processing claims for temporary protection and the alien explicitly applies for it (number [263]). In one instance, the Procedures Directive explicitly addresses situations of mass influxes.¹⁴

6.2 Asylum procedures at first instance

In this paragraph, I address rules on procedures for the examination of requests for protection at first instance. I will first discuss relevant rules of international law (paragraph 6.2.1). Then I address the general set-up of procedures at first instances (paragraph 6.2.2), and discuss two aspects in some detail: the rules on organisation of the various types of asylum procedures at

first instance that the Procedures Directive establishes, and the safeguards that apply in these procedures (paragraphs 6.2.3 and 6.2.4).

6.2.1 International law

The effectiveness principle

[365] Neither the Refugee Convention nor other instruments of international law establish systems for the processing of claims for protection. Still, international asylum law does set conditions on procedures for the granting of protection. For in order to comply with international asylum law, states must implement and apply it in an effective way.¹⁵ The relevance of the “effectiveness” requirement for procedures can be traced in the rulings of several courts.

The International Court of Justice asserted in its judgement *LaGrand* that the requirement that states give “full effect” to a treaty provision can have implications for application of domestic procedural rules.¹⁶ The case concerned two German brothers who had been sentenced to death in the United States of America. The United States authorities had not informed the German consul, as they should have done according to Article 36(1) of the Vienna Convention on Consular Relations (VCCR).¹⁷ The LaGrand brothers learnt of their rights under this Convention only after their conviction and launched proceedings against their death sentences, *inter alia* on the ground that the United States had failed to notify the German consul. The United States courts rejected their claim on the basis of the domestic “procedural default” rule: they should have raised the claim earlier, before a state court. Pursuant to Article 36(2) VCCR, domestic rules indeed do apply to claims under Article 36(1) VCCR. But the International Court of Justice ruled that the application of this domestic doctrine of “procedural default” in this case violated Article 36 VCCR, because domestic procedural rules “must enable full effect to be given to the purposes for which the rights accorded under this article are intended.”¹⁸

Likewise, the Grand Chamber of the European Court of Human Rights held in its judgement *Mamatkulov II* that

“treaties must be interpreted in good faith in the light of the object and purpose [...] and also in accordance with the principle of effectiveness.”¹⁹

As to the Refugee Convention, Legomsky argues that

“[t]he Convention does not expressly prohibit [...] any specific procedure, but [if a] procedure is so unfair and unreliable, the act of establishing it assures that an unacceptably high number of refugees will be returned

erroneously to their persecutors. Thus, it is submitted, the establishment of an unfair refugee status determination procedure is itself a violation of Article 33 [RC].”²⁰

The Appeals Court of The Hague (the Netherlands) reasons along the same lines, in its judgement on the compatibility of the Dutch fast track procedure with Article 33 RC:

“[t]he Refugee Convention itself contains no provisions on the procedure that the Contracting states should follow in order to determine who is a refugee in the sense of the Convention. But the prohibition on *refoulement* of Article 33 Refugee Convention does entail, that a Contracting state must not establish this procedure in such a way, that an asylum seeker has insufficient opportunity to show that he or she is a Convention refugee, with the result that refugees in the sense of the Convention run a disproportionate risk on *refoulement* [my translation, HB].”²¹

The UNHCR Handbook states that in view of the (usually) “particularly vulnerable situation” of asylum seekers, their claims should be dealt with in “specially established procedures” that should meet some basic requirements.²²

Thus, as international law does not establish procedures for the processing of claims for international protection, states may apply domestic procedural rules. But domestic rules may not prohibit ‘full effect’ being given to international asylum law. This requirement applies to both procedures at first instance as well as to appeal procedures. Below, I address the implications of the prohibitions of *refoulement* for procedures at first instance (rules of international law on appeal procedures are addressed in paragraph 6.3.1).

Article 33 RC

[366] The UNHCR Handbook elaborates on the “basic requirements, which reflect the special situation of the applicant” that procedures should meet.²³ These basic requirements were “recommended” by ExCom.²⁴ Their observance is therefore in itself not an obligation under international law (see number [32]), but asylum procedures that do not meet these requirements are particularly susceptible to not giving the asylum seeker ‘sufficient opportunity’ to show that he is a refugee. The requirements suggested in the UNHCR Handbook will be addressed in the discussion of the Community provisions on asylum procedures in the following paragraphs.

Article 3 CAT

[367] According to Article 3(2) of the Convention Against Torture,

“[f]or the purpose of determining whether there are [substantial grounds

for believing that the alien would be in danger of being subjected to torture], the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

Boeles observes that Article 3(2) bears witness to the applicability of the effectiveness principle to Article 3(1) CAT: the Contracting states must operate procedures that guarantee that the risk of expulsion to a country where the applicant is threatened with torture is as low as possible.²⁵ But specific requirements for the powers of the “competent authorities” and the layout of procedures before them cannot be based on this provision. For according to Article 12 CAT, “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there are reasonable grounds to believe that an act of torture has been committed in any territory under its jurisdiction”.

The Convention does not prescribe the conduct of a “prompt and impartial investigation” in cases where the alleged torture took place outside the Contracting state’s territories. Hence, the Convention left the issue to the discretion of the contracting states. Absence of specific procedural guarantees as such is not in violation of Article 3 CAT.

Article 3 ECHR

[368] Article 3 ECHR, like Article 33 RC, implicitly conditions the application of procedural rules. Already in *Vilvarajah* the European Court of Human Rights has stated that

“[t]he Court’s examination of the existence of a risk of ill treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe”.²⁶

Here, the requirement of a rigorous scrutiny concerned the Court’s own examination of the case, but in *Jabari* it stated on the same grounds that

“a rigorous scrutiny must necessarily be conducted of an individual’s claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3”,

apparently applying the obligation to the state, and continued that in the present case

“[t]he Court is not persuaded that the authorities of the responding claim conducted any meaningful assessment of the applicant’s claim [...]”.²⁷

So, the state addressed by the alien must perform a “rigorous scrutiny” of the claim, which entails that its authorities must conduct “a meaningful assessment” of it. In the case of *Jabari*, the European Court of Human Rights concluded that the automatic and mechanical application of a too short time limit (five days) for submitting an asylum application was “at variance with” Article 3 ECHR.²⁸

[369] The European Court of Human Rights addressed the obligation not to apply procedural rules that bar full effect of the prohibition of *refoulement* in an oblique way in the *Bahaddar* case.²⁹ The legal question was whether or not Bahaddar, a failed asylum seeker, had exhausted the domestic remedies, for appeal to the European Court of Human Rights is not admissible if the applicant has not first taken recourse to all “accessible” and “effective” domestic remedies in order to prevent violation of his Convention rights.³⁰

The Court ruled that “even in cases of expulsion” where there is an alleged risk of ill treatment, “the formal requirements and time-limits laid down in domestic law should normally be complied with”, but “special circumstances which absolve an applicant from the obligation to comply with such rules” can occur, depending on the facts of each case, and added:

“in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim”.³¹

In this case, the Court found no “special circumstances” absolving Bahaddar from compliance with formal requirements. It considered that Bahaddar could have asked the domestic court to extend the period for submitting evidence. Further, Bahaddar had had the opportunity to lodge a new application. And

“[f]inally, it would be open to the applicant even now to lodge a further such application, and if necessary to apply for an interim measure restraining the respondent Government from expelling him pending the outcome of the ensuing proceedings (see paragraph 34 above). It has not been argued that such a remedy would necessarily be ineffective”.³²

So, it appears that in principle domestic law can be applied to asylum procedures. This is different when application of domestic procedural law (for instance, fatal time-limits) bars “a realistic opportunity to prove” the claim, that is, make the safeguard of Article 3 ineffective. The possibility of Bahaddar

lodging a fresh claim at any time during the procedure was also a decisive factor.³³

Conclusions

[370] International asylum law does not specifically regulate procedures for the granting of protection, but the obligation to give full effect to the prohibitions of *refoulement* has implications for such procedures. Article 33 RC requires that these procedures offer the applicant “sufficient opportunity” to establish his case. Article 3 ECHR requires that domestic authorities perform a “rigorous scrutiny”, that is, a “meaningful assessment” of the claim that expulsion would result in ill-treatment, and therefore offer the applicant a “realistic opportunity” to prove his claim. Domestic procedural law may be applied in asylum proceedings, unless they bar such an assessment or opportunity.

6.2.2 The set-up

[371] The basic principle for Community asylum procedures is to be found in the Dublin Regulation: Article (3)(1) states that the “Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum”. The Procedures Directive establishes a two tier system for this decision making: “procedures at first instance”, addressed in Chapter III PD, and “appeal procedures”, addressed in Chapter V. Chapter II PD contains “basic principles and safeguards” that may apply to procedures at both instances (see paragraph 6.2.4.1).

The main rules for procedures at first instance are laid down in Article 23(1) read in conjunction with 29(1) PD. According to Article 23(1) PD,

“Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.”

According to Article 29(1) PD,

“[...] Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to [the Qualification Directive]”.

Together, these provisions state three obligations. First, the Member States must process applications in an “examination procedure”; second, the procedure must be in accordance with the procedural safeguards in Chapter II;³⁴

third, Member States must consider whether the applicant qualifies for a status pursuant to the Qualification Directive.

[372] All three rules are subject to a limited³⁵ number of exceptions. Both the obligation to process the claim and the obligation to do so in accordance with the procedural safeguards ex Chapter II (the first and second rule) suffer exception pursuant to Article 24 PD:

“1. Member States may moreover³⁶ provide for the following specific procedures derogating from the basic principles and guarantees of Chapter II:

- (a) a preliminary examination for the purpose of processing cases considered within the framework of the provisions set out in Section IV;
- (b) procedures for the purpose of processing cases considered within the framework set out in Section V.

2. Member States may also provide a derogation in respect of Section VI.” Thus, Member State may provide for “specific procedures” as addressed in Sections IV and V of Chapter III that derogate from the second obligation, that is, wherein the “basic principles and guarantees” do not apply.³⁷ Furthermore, it follows from Article 24(2) that “in respect of Section VI” the Member States may derogate both from the obligation to process applications as well as from the duty to do so in accordance with Chapter II: no examination has to take place if the third country exception set out in that Section (Article 35A) applies.³⁸

In summary, the Procedures Directive provides for five procedures at first instance for the handling of applications for asylum (the designations are mine, HB):

- (1) the ‘normal procedure’ pursuant to Article 23(1);
- (2) the ‘preliminary procedure’ for the processing of subsequent applications, set out in Section IV, Articles 33 – 34 PD;
- (3) the ‘normal border procedure’ pursuant to Article 35(1) PD in Section V;
- (4) the ‘special borders procedure’ pursuant to Article 35(2) PD, also in Section V;
- (5) the ‘safe neighbouring third country procedure’ set out in Section VI, i.e. Article 35A PD.

Each of these procedures has its own set of “basic principles safeguards”.

[373] The third rule, the obligation to determine whether or not the applicant qualifies for refugee or subsidiary protection, is subject to five exceptions.

First, no examination to the merits has to take place when another state is “responsible” for it according to the Dublin Regulation.³⁹ Second, “Member States are not required to examine whether the applicant qualifies as a refugee in accordance with” [the Qualification Directive] where an application is inadmissible.⁴⁰ Third, the obligation to address the foundedness is “without prejudice” to rejection or discontinuation of the examination after withdrawal.⁴¹ Fourth, if the ‘preliminary procedure’ applies, the obligation to establish whether the applicant qualifies for protection is limited to establishing whether the subsequent application merits full examination in the normal examination or normal border procedure.⁴² If not, the authority may reject the claim. Fifth, no examination has to take place in case the ‘safe neighbouring third country’ exception applies.⁴³ If none of these exceptions applies, the authority must address the merits of the claim for protection, and decide whether it is “unfounded” (Article 29(1) PD), “manifestly unfounded” (Article 29(2) PD) or well-founded.

[374] In summary, Article 3(1) DR read in conjunction with 23(1) read in conjunction with 29(1) PD requires that (1) each application is examined (2) in accordance with the basic principles and safeguards of Chapter II (3) as to qualification for refugee or subsidiary protection status. The first obligation suffers exception when the ‘safe third neighbouring country procedure’ applies (Article 24(2) PD), the second, when one of the ‘special procedures’ applies (Article 24(1) PD), and the third obligation suffers exception when the Dublin Regulation applies, when the application is inadmissible (Article 25 PD), when it is withdrawn (as set out in Articles 19 and 20 PD), when it concerns a subsequent application (Articles 33 and 34 PD) and when the ‘safe third neighbouring country’ exception applies (Article 24(2) PD).

The rules on organisation of the five procedures are discussed in paragraph 6.2.3, the procedural safeguards under 6.2.4. The exceptions to the obligation to consider whether claims are well-founded are addressed in the context of the grounds for refusal, in paragraph 6.4.

6.2.3 The organisation

[375] According to the Preamble to the Procedures Directive, “The organisation of the processing of applications for asylum is left to the discretion of Member States”.⁴⁴

Indeed the Directive states few rules on the organisation of procedures for granting protection. Most of the discussion below addresses the distinction between the five procedures established by Article 23 read in conjunction with 24 PD – the ‘normal’, the ‘normal border’, the ‘special border’, the ‘preliminary’ and the ‘safe third neighbouring country’ procedures.

The ‘normal procedure’

[376] The ‘normal procedure’ is the procedure that obligatorily applies to the processing of applications if no special procedure applies.⁴⁵ It can have two shapes: the “normal” and the “accelerated” or “prioritised” examination.⁴⁶

The Procedures Directive does not provide for a special time frame for accelerated examination. Both an accelerated and a “normal” examination procedure must be “concluded as soon as possible”; if no decision can be taken within six months, the applicant shall either be informed of the delay or, upon his request, receive “information on the time-frame” when a decision may be expected – which does not bind the Member State to comply with that “time-frame”.⁴⁷ In Article 11(2) RSD, it is assumed that it may take over a year before a first decision on the application is taken.⁴⁸

In which types of cases may the examination be accelerated? According to Article 23(3) PD,

“Member States may prioritise or accelerate any examination [...] including where the application is likely to be well-founded or where the applicant has special needs”.

Hence, *any* case may be “accelerated” or “prioritised”.⁴⁹ Article 23(4) further provides that “Member States may lay down that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if” one of the no less than fifteen grounds that follow apply. But as any case may be prioritised pursuant to Article 23(3) PD, the list of Article 23(4) has no consequences in this respect. The Directive does not establish any (further) rules that apply specifically to accelerated examination in general, or to the list of Article 23(4) PD in particular. The occurrence of this list can only be explained by reference to the drafting history of the Procedures Directive: in draft versions, examination in the accelerated procedure on the grounds listed in Article 23(4) did have legal consequences for the right to remain during appeal proceedings. Since the relevant draft provisions were dropped, Article 23(4) PD remained unaltered, now serving only as a catalogue of examples of negative decisions (see further numbers [430] and [431]).

[377] In the ‘normal procedure’, applications must be processed in accordance

with all the “basic guarantees” laid down in Chapter II PD.⁵⁰ The examination is in principle performed by the “determining authority” – a specialised asylum service of sorts (see number [390]).⁵¹ The personnel of this authority must be capable of conducting an “appropriate examination”,⁵² and be properly trained.⁵³ Another authority than this specialised agency (for example, border guards) may be responsible for processing claims where transfer pursuant to the Dublin Regulation is being considered,⁵⁴ and when the decision upon the application “in the light of national security provisions, provided a determining authority is consulted prior to this decision as to whether the applicant qualifies as a refugee by virtue of [the Qualification Directive]”.⁵⁵ Meaning and consequences of the distinction between the “determining” authority and the other authority is relevant for applicability of “basic guarantees and principles”, and will be discussed in that context (paragraph 6.2.4.1).

As to other aspects of the organisation of the ‘normal procedure’, Member States

“may impose upon applicants for asylum obligations to cooperate with the competent authorities insofar as these obligations are necessary for the processing of the application”.⁵⁶

The applicant should in principle be offered the opportunity of a “personal interview”.⁵⁷ Prior to this interview, a meeting “with the applicant for the purpose of assisting him/her with filling in his/her application and submitting the essential information regarding the application” may take place,⁵⁸ but this interview is not obligatory. Rules on this interview and other “basic principles and guarantees” are further discussed in paragraph 6.2.4.

[378] The examination in the ‘normal procedure’ may result in five types of decisions: inadmissible,⁵⁹ manifestly unfounded, unfounded, or founded⁶⁰ of the application, or the decision not to continue the examination.⁶¹ The Procedures Directive does not impose or imply an obligation to introduce in domestic law one of these categories of negative decisions.⁶² Except for the exception of the safe third country of origin (see par. 6.4.5), all grounds for refusal are facultative. The Directive therefore allows the Member States to grant refugee or subsidiary protection status to applicants although these grounds for refusal apply. Moreover, pursuant to the Procedures Directive, different labels may be attached to the same ground of refusal. Thus, the exception of the safe third country may be a ground for inadmissibility⁶³ as well as for unfoundedness,⁶⁴ and all specifically mentioned grounds for unfoundedness may also be labelled as a ground for manifest unfoundedness.⁶⁵ The Procedures Directive does therefore not impose the obligation to introduce the categories of “inadmissibility” or “manifest unfoundedness”.⁶⁶

The preliminary examination procedure

[379] Member States “may” (not must) apply a specific ‘preliminary examination procedure’ to four “cases of subsequent applications”.⁶⁷ First, the alien explicitly or implicitly withdrew the previous application.⁶⁸ Second, there is a “decision” (at first instance) or “final decision” (a decision no longer subject to a appeal)⁶⁹ on a previous application.⁷⁰ Third, a dependant (a person who previously consented to have his case be part of another application made on his behalf, see number [394]) lodges an application of his own.⁷¹ Fourth, the application is “filed at a later date” and the applicant “either intentionally or owing to gross negligence fails to go to a reception centre or to appear before the competent authorities at a specified time.”⁷² Arguably, this ground is a variant of the first category: the applicant did not comply with the requirement to file the application “as soon as possible”,⁷³ and implicitly withdrew it by failing to appear in due time.⁷⁴

[380] In the ‘preliminary examination’ procedure, examination is limited to the question of whether the subsequent application merits being “further examined in conformity with Chapter II” (that is, in the ‘normal examination’ or the ‘normal border procedure’, see number [403]).⁷⁵ When such further examination is required will be discussed in paragraph 6.4.4, on subsequent applications.

The preliminary examination procedure is subject to far fewer procedural safeguards than the ‘normal procedure’ (see paragraph 6.2.4.3). Another authority than the (specialised) determining authority may conduct the preliminary examination, provided that “this authority has access to the applicant’s file regarding the previous application”.⁷⁶ Moreover, Article 34(2) PD states some special rules on the burden of proof that applicants should meet in the preliminary procedure, to be discussed in paragraph 6.4.4.

Normal border procedures

[381] According to Article 35(1) PD, Member States “may provide for” procedures for deciding on applications made “at the border or transit zones”.⁷⁷ In cases of mass influxes, the procedure may also apply “where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone”.⁷⁸ The Procedures Directive does not address the kind of decisions that may be taken in this procedure; arguably, these are the same as those taken in the ‘normal procedure’ (see number [378]). All basic principles and safeguards of Chapter II apply to this procedure.⁷⁹ It therefore differs in only one respect from the ‘normal pro-

cedure’: the “responsible authority” is not necessarily the “determining authority” as defined in Article 3A(1) - for practical purposes, in this procedure for example border guards may consider applications.⁸⁰ The legal consequences of the distinction between the “determining” and other authorities are addressed in paragraph 6.2.4.1.

Special border procedures

[382] A second type of border procedures concerns decisions

“at the border or in transit zones on the permission to enter their territory of applicants for asylum who have arrived and made an application for asylum at such locations”.⁸¹

Hence, the ‘special border procedure’ applies to applicants who have no permission to enter. Consequently, it does not apply to applicants in possession of a visa or otherwise authorised to enter.⁸² This procedure is subject to a standstill clause.⁸³

The authority that examines applications in this procedure may be another one than the “determining authority” (the specialised asylum agency, cf. number [394]).⁸⁴ Decisions shall be taken “as soon as possible”; if not within four weeks, the applicant has “entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of” the Procedures Directive – that is, in fact, in the ‘normal procedure’.⁸⁵ Examination may take longer in case of mass influxes in accommodations in the proximity of the border or transit zones.⁸⁶ A “refusal to enter” amounts to a negative decision on an application for asylum,⁸⁷ but “permission to enter” does not (or not necessarily) imply a positive decision on the application.⁸⁸ No further rules are stated for the organisation of this procedure, except for application of some “basic principles and safeguards” (see paragraph 6.2.4.3).

The safe third neighbouring country procedure

[383] According to Article 35A(1),

“Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II takes place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2”.

Thus, “examination” may be done without altogether in case of illegal entry from certain safe third countries. This procedure applies if two conditions are

met: the alien enters or has entered “illegally”, and did so “from a safe third country according to” Article 35A(2). Requirements and rules on designation of this particular type of safe third countries will be addressed in paragraph 7.5.5.

Arguably, the provision applies only in Member States that border those safe third countries, although the provision does not explicitly state so. It applies in case of entry “into [a Member State] from a safe third country”. When the alien illegally enters a border Member State and then travels through to another Member State, he enters the last state “from” a Member State, not from the third country. The same holds true for aliens who came by plane from the safe third country. It follows from Article 3(1) PD that for the purposes of the Procedures Directive, transit zones do not make part of the territory of the Member States.⁸⁹ Illegal entry “into the territory” of a Member State after a flight from the safe third country would be entry from the transit zone, not “from a safe third country”. Hence, Article 35A addresses only aliens who are caught in the act of illegally entering, or caught just after having illegally entered a Member State over the land border with a safe third country according to Article 35A(2).

[384] There is no obligation to conduct an “examination” in case of illegal entry from certain safe third countries. But it follows from Article 35A that “establishing” whether or not the requirements are met is obligatory. The “competent authority” responsible for deciding in this procedure may, obviously, be another one than the “determining authority” meant in Article 3A(1) PD.⁹⁰ Application of the provision yields a “decision”.⁹¹ If the decision cannot be implemented because the third country does not readmit the applicant (see number [532]), his case must be examined “in accordance with the basic principles and guarantees described in Chapter II”,⁹² that is in fact in the normal procedure or in the normal border procedure. Obviously, the basic principles and guarantees of Chapter II do not apply.⁹³

Concluding remarks

[385] The five procedures established by the Procedures Directive differ from each other mainly in two respects: the type of applications that may be processed, and the basic principles and safeguards that apply. Most extensive is the scope of the ‘normal procedure’ – it may apply to any application by any applicant on the territory or at the border. The ‘normal border procedure’ applies to any type of application, lodged at the border or in transit zones. Decision making in both procedures is subject to the basic principles and guarantees of Chapter II.

The ‘special border procedure’ is a transitional arrangement for Member States that run border procedures that are not up to those standards. If in force at the time of adoption of the Procedures Directive, those states are not required to apply certain principles and guarantees when examining applications lodged at the border by applicants who have no permission to enter. The preliminary procedure applies to “subsequent applications” only; the main difference with normal procedure is the absence of most guarantees. The ‘safe third neighbouring country procedure’, finally, may apply only at or close to the border with non-Member States. Its special distinguishing feature is the absence of an obligation to examine applications and of procedural safeguards.

[386] The Procedures Directive sets very few rules on the organisation of these procedures. Most conspicuously, it only mentions the possibility to “accelerate” or “prioritise” claims, but gives no rules on even the time frame of fast-track procedures.

International law is neutral on the organisation of procedures, as long as they do not affect the effectiveness of protection from *refoulement* and allow for a meaningful and rigorous scrutiny of claims (cf. number [363]). Too short time limits may bar the possibility to conduct a meaningful examination; absence of such time limits is therefore regrettable. Most important for securing compliance with international law is the obligation to process all applications lodged in the territory or at the border of the Member States. Obviously, the exception made in case of the ‘safe third neighbouring country procedure’ therefore raises questions as to their compatibility with international law. These will be addressed in paragraph 7.5.5.

6.2.4 Basic principles and guarantees

Chapter II addresses “basic principles and guarantees”. Most of these provisions concern safeguards like the prohibition on expulsion, the right to a personal hearing, access to a legal counsellor and so on. We saw above that different sets of those “principles and guarantees” apply in the different procedures. But on closer scrutiny, the scope of application of these “principles and guarantees” raises some intricate questions that I will address under paragraph 6.2.4.1. Subsequently, the content of the safeguards that apply in the normal, and of those that apply in the special procedures will be discussed (paragraphs 6.2.4.2 and 6.2.4.3).

6.2.4.1 Scope of application

[387] In Chapter II, “basic principles and guarantees” are laid down. On the basis of their wording, most Chapter II provisions would apply to all procedures at first instance: most of them address or may apply to applicants or (decisions on) applications. We should observe that several Chapter II provisions explicitly address appeal proceedings and thus apply to them, although no reference to those principles and guarantees is made in Chapter V (cf. numbers [423] and [424]). Hence, Chapter II provisions may apply on their own terms, and not because of reference to them in other provisions of the Directive (as for example Article 23(1) PD).

Article 23 PD confirms that all relevant basic principles and guarantees do apply to the ‘normal procedure’ (in its ‘normal’ shape as well as in the fast track variant). But pursuant to Article 24 PD, derogation from the basic principles and guarantees can be made in all ‘special procedures’.

Still, all or most basic principles do apply in most special procedures, for one of two reasons. First, because provisions that establish or address those special procedures state so. According to Article 35(1), all safeguards set out in Chapter II apply to the ‘normal border procedure’, and pursuant to Articles 34 and 35(3) PD, a number of them apply to the ‘preliminary’ and the ‘special border procedure’ as well. Second, some of the provisions of Chapter II apply on their own terms to special procedures, notwithstanding the derogation clause of Article 24 PD. Article 15(1) PD (guarantees for unaccompanied minors) explicitly addresses “all procedures provided for in this Directive”. Article 6 PD, on expulsion during asylum procedures at first instance, necessarily applies to the ‘preliminary procedure’ although no reference is made to the provision in Section IV (see number [401]). We must assume that as *leges speciales* these provisions have precedence over Article 24 PD. Other provisions on ‘basic principles and guarantees’ do not contain similar indications.

[388] The scope of basic principles and guarantees that apply to (decisions by) the “determining authority”, such as the prohibition on expulsion during examination and the right to a hearing, is somewhat complicated.⁹⁴ Other provisions seem to have a broader scope as they speak of “competent authorities”⁹⁵ or “authorities”⁹⁶ (or simply address the Member States, without making mention of any specific authority).⁹⁷ But Article 2(e) PD defines the “determining authority” as

“any quasi-judicial or administrative body in a Member State responsible

for examining applications for asylum and competent to take decisions at first instance in such cases [...]”.⁹⁸

It follows that the authority that examines and decides on applications is a “determining authority” in the sense of Article 2(e), and therefore in the sense of the relevant basic principles and guarantees.

[389] However, Article 3A(1) states that “Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of the applications”, whereas according to Article 3A(2) “Member States may provide that another authority is responsible in the following cases”. So next to the “determining authority” as defined in Article 3A(1) there may be “another authority responsible”, if Article 3A(2) allows for it. Article 3A(2)(c) quite explicitly opposes this other authority to the determining one (cf. number [438]). Should we assume that the basic principles and guarantees that address “(decisions by) the determining authority”, such as the right to remain during examination and the right to a hearing do not apply to those procedures where Member States have appointed “another responsible authority” in accordance with Article 3A(2) PD?

This reading is unlikely for several reasons. If we assume that Article 3A defines the term “determining authority” for the purposes of Chapter II, we would have to disregard Article 2(e) completely. Neither text nor context provides for any indication that Article 3A serves the purpose of limiting the scope of the provisions of Chapter II. Further, it would follow that the ‘normal procedure’ would be subject to lower standards than the ‘special border procedure’ – which is obviously contrary to the purpose of Article 35 PD (cf. number [404]).⁹⁹ Consequently, “another responsible authority” as meant in Article 3A(2) is a “determining authority” for the purposes of the relevant Chapter II provisions, in accordance with Article 2(e) PD.

[390] This leaves two questions to answer. First, if the prohibition on expulsion, the right to a hearing and the other provisions that refer to the “determining authority” apply to examination by any authority, what does the distinction between “determining” and other authorities made in Chapter II provisions entail? The literal meanings of the terms “authorities” and “competent authority” have a wider scope than “determining authority”. They address next to the determining authority the appeal authorities¹⁰⁰ and other authorities that may be involved in the processing of asylum applications. Their involvement concerns other activities than examining or deciding on applications (which activities

single out the “determining authority” as meant in Article 2(e) PD), dependent on the subject matter addressed by the relevant Chapter II provision.

Second, what does the distinction between the “determining” and the “other responsible authority” made in Article 3A entail? Article 3A(1) PD, arguably, serves the purpose of obliging the Member States to establish one authority that both examines and decides on applications, a specialised asylum agency that is responsible for procedures, in accordance with the UNHCR Handbook.¹⁰¹ This agency must perform examination at first instance, unless one of the exceptions of Article 3A(2) applies. Article 3A(1) requires that examination by the “determining authority” complies with “in particular Articles 7(2) and 8” PD, two of the “basic principles and guarantees” in Chapter II. Article 7(2) requires an “appropriate” examination, and stipulates that both examination and decision must be “individual”, “impartial” and “objective”; the personnel that examine applications must be properly trained.¹⁰² All these requirements are not stated for other authorities responsible pursuant to Article 3A(2); Article 3A(3) merely requires that the personnel of such other authorities be properly trained. Hence, the Procedures Directive sets certain standards for examination by the “determining authority” pursuant to Article 3A(1), which do not apply to other “responsible authorities” appointed on the basis of Article 3A(2).

For practical purposes, we can conclude that Articles 7(2) and 8 PD apply in any procedure if examination is done by the “determining authority” as meant in Article 3A(1) (thus irrespective of applicability of the ‘basic principles and guarantees’), as well as to examination by “another authority” if both provisions apply by virtue of applicability of “the basic principles and guarantees of Chapter II”, that is, in the ‘normal border procedure’. Article 3A(3) therefore has practical meaning only when the examination is done by “another authority” as meant in Article 3A(2), and the basic principles and guarantees of Chapter II do not apply.

[391] In summary, the scope of application of the “basic principles and safeguards” is defined as follows. All principles and safeguards of Chapter II apply to the ‘normal’ and the ‘normal border procedures’; to the other special procedures apply those safeguards that are mentioned in Articles 34 and 35(3) PD, as well as Articles 6 and 15 PD. In Chapter II provisions that refer to the “determining authority”, mean the “determining authority” as defined in Article 2(e) PD. These provisions do not apply only to the specialised immigration service meant in Article 3A(1), but also to any authority that is responsible for examination and decision-making.

6.2.4.2 Standards on the ‘normal procedure’ and the ‘normal border procedure’

Non-refoulement

[392] Article 6(1) PD states that

“[a]pplicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until such time as the determining authority has made a decision in accordance with the procedures at first instance [...]. This right to remain shall not constitute an entitlement to a residence permit.”

The provision secures protection from *refoulement* during the examination at first instance; protection from *refoulement* after the decision at first instance has been taken is left to domestic law (see paragraph 6.3.2). At what moment does the protection of Article 6(1) PD set in? According to Article 5(1) PD, “Member States may require that applications for asylum be made in person and/or at a designated place”.¹⁰³ Hence, the protection afforded by Article 6(1) PD does not necessarily stretch from the moment that the alien reaches the border of the Member State, and expresses his wish to apply for asylum to an authority. But according to Article 5(5),

“Member States shall ensure that authorities likely to be addressed by someone who wishes to make an asylum application are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority”,

in accordance with the UNHCR Handbook.¹⁰⁴ It appears that a request for protection already counts as an “application” before it has reached the competent authorities. Arguably, the protection from *refoulement* by Article 6(1) PD therefore stretches from the moment that the alien addressed some “authority”, until a decision has been taken.

[393] The right to remain during the ‘examination procedure’ suffers exception (*inter alia*, see further number [401]) where the Member States

“will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European Arrest Warrant or otherwise, or to a third country, or to international criminal courts or tribunals”.¹⁰⁵

As the “European Arrest Warrant” may be issued only for certain punishable acts,¹⁰⁶ Article 6(2) PD also addresses surrender to other Member States “otherwise”. We may further observe that surrender to “international courts or tribunals” also implies extradition or surrender to the Member State or the third

country that hosts the court or tribunal.¹⁰⁷ Obviously, extradition or surrender is without prejudice to the Member States' obligations under the prohibitions of *refoulement* as the *Soering* case showed (and the Framework Decision on the European Arrest Warrant explicitly recognises).¹⁰⁸ The Procedures Directive does not address this issue, nor does it explicitly address the consequences of extradition or surrender for the examination of the application.

Could applicants who are not protected from expulsion by Article 6 PD rely on Article 21(1) QD? According to this provision,

“Member States shall respect the principle of non-refoulement in accordance with their international obligations.”

The second paragraph states that

“Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not”

when the grounds mentioned in Article 33(2) RC apply. It would follow that Article 21(1) QD applies to unrecognised refugees such as applicants (see par. 8.7.1), and to persons within the scope of Articles 3 ECHR, 3 CAT and 7 CCPR whose application has not yet been assessed. However, the provisions of the Qualification Directive address the content of the protection granted to persons who qualify for “refugee status” or “subsidiary protection status”.¹⁰⁹ Article 21 QD can therefore be relied on only after status determination. The reference to unrecognised refugees in Article 21(2) QD concerns persons who qualify for refugee status in the sense of Article 2(d) (and 13) QD, but to whom the benefits of the Qualification Directive may be denied because the grounds for expulsion in Article 33(2) or 32(1) RC apply (see further par. 8.5).

Access

[394] The requirement that applications be examined and decided upon “individually” (Article 7(2) PD) is partially elaborated in Article 5 PD, on “access to the procedure”. Each adult has the right to make an application on his own behalf. Member States “may” provide that an applicant can make an application “on behalf of his/her dependants”; consent of the dependant adult is required.

To a certain extent, the provision secures that individual assessment take place. There is however one important *caveat*. The circumstances of the request for “consent” by the dependant may hinder a free deliberation or consultation, or later developments (for example, assessment of facts by the legal counsellor) may result in the finding that the consent was misinformed. An obvious example would be the consent given by a woman to have her applica-

tion making part of her husband's, while she is not willing (because of her husband's physical presence) or unable (for mental reasons) to state that fear or risk of rape would warrant a separate application (or who became aware of the relevance of that rape for the application only after legal counselling). In order to prevent such incidents from happening, each application should be assessed individually.

But Member States do not have to give "dependants" the opportunity of a personal interview; any request by the dependant to have the application considered separately may be treated as a "subsequent" application which entails that facts and elements that could have been put forward before the "subsequent" request can be left out of account (see number [440]). Once given, the consent may thus effectively block any assessment of facts or elements indicating well-founded fear or real risk of harm.

[395] Unaccompanied minors must, and dependant minors¹¹⁰ may be offered the opportunity to lodge an application on their own behalf.¹¹¹ As in the case of "dependant" adults discussed above, minors need not be offered the opportunity of an individual interview, and a later application by the minor (whether still under eighteen, or having become an adult) may be treated as a "subsequent" application.¹¹²

Safeguards on the assessment

[396] According to the Preamble to the Procedures Directive, the "necessary safeguards" on asylum procedures

"should require that [...] every applicant is to have effective access to procedures, the opportunity to co-operate and properly communicate with the competent authorities so as to present the relevant facts of his case and sufficient procedural guarantees to pursue his case at and throughout all stages of the procedure",¹¹³

which is in accordance with the UNHCR Handbook.¹¹⁴ Offering the opportunity to cooperate and properly communicate implies that the applicant is informed on the course of the procedure;¹¹⁵ "whenever necessary", the applicant must receive the services of an interpreter (paid for out of public funds), "at least" when the personal interview is held (see below).¹¹⁶ Member States "may provide for rules concerning the translation of documents relevant for the examination of applications".¹¹⁷ Hence, translation is not obligatory.

As to legal counselling, Member States must "allow" applicants to consult lawyers at their own costs.¹¹⁸ Free legal assistance is required only in the event of a negative decision, hence in appeal proceedings (see further par. 6.3).¹¹⁹

Further, the Directive sets some basic guarantees on decisions. Decisions must be in writing; negative ones must be motivated.¹²⁰ Further, applicants must be given notice in due time of the decision in a language they may reasonably be supposed to understand, and be informed of the possibility to challenge the decision.¹²¹

[397] Most important among the safeguards on the assessment is the right to a personal interview. Article 4(1) of the Qualification Directive obliges the Member States (in fact the determining authority) to “assess” the relevant elements of the application. This obligation encompasses the duty to take *inter alia* the individual circumstances of the applicant into account, and assessment of his credibility.¹²² The Comment on Articles to the Proposal Procedures Directive observes that

“[s]ince in most if not all asylum cases the determining authority must assess the credibility of statements and/or of the applicant on the basis of all available facts, it is imperative for a proper assessment that applicants have, as much as possible, the opportunity to bring these forward in a personal manner, i.e. in an interview”.¹²³

Accordingly, Article 10(1) PD requires that

“[b]efore a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.”

The Procedures Directive provides for some further safeguards for this interview. A person “competent under national law” must conduct it, who is at any rate “sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, in so far as it is possible to do so”.¹²⁴ An interpreter should be present.¹²⁵ The conditions under which the interview is held should “allow applicants to present the grounds for their applications in a comprehensive manner”¹²⁶ and in particular ensure “appropriate confidentiality”.¹²⁷ It is left to the Member States to provide whether or not the applicant can bring with him his legal counsellor.¹²⁸ A written report should be made of every interview, containing “at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) [QD].”¹²⁹ Applicants may, but need not be given the right to comment on this report of the interview; they must have “timely access” to it, but that timely access may be granted only after a negative decision.¹³⁰

[398] In which types of cases must the Member States offer the opportunity of a personal interview – in particular, must they do so only when the foundedness of the claim is addressed? Article 10(1) PD applies to a “decision” on an “application” by the determining authority. Article 2(d) defines a (final) “decision” as a “decision whether an [applicant] be granted refugee status by virtue of [the Qualification Directive]” (and which is no longer subject to a remedy). Article 29(1) PD states that “Member States may only consider an application for asylum as unfounded if the determining authority has established that the applicant does not qualify for refugee status pursuant to Council Directive 2004/83/EC”. Thus, we must distinguish the decision on the granting of refugee status (Article 2(d)) from the decision on qualification as a refugee (Article 29(1)). Arguably, the definition in Article 2(d) is, read in conjunction with Article 29(1), sufficiently broad to encompass admissibility decisions: when a Member State turns down an application because the applicant should turn to safe third country, it decides not to grant refugee status, without addressing the qualification as a refugee. We may further observe that Article 38(1)(a) PD labels decisions on admissibility as “decisions”, apparently in the sense of Article 2(d) PD.¹³¹

Hence, the scope of Article 10 is not restricted on decisions on “qualification” for refugee status pursuant to the Qualification Directive. Rejection of an application because another Member State is responsible or on (other) grounds for inadmissibility that are mentioned in Article 25 PD may hence take place only after the opportunity to an interview was offered.

[399] This obligation to offer the opportunity of a personal interview is subject to a number of exceptions. To begin with, only adult “applicants” must be given the opportunity to have an interview; dependant adults who gave the consent meant in Article 5(3) PD (cf. number [394] above) “may”, not must, be given the opportunity.¹³² As to minors, “Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview”.¹³³ Further, Member States may “take into account the fact that an applicant failed to appear for a personal interview, unless he or she had good reasons for the failure to appear”.¹³⁴ Failure to appear hence may be deemed to negatively affect the credibility. But such failure may have far more serious consequences: Member States may assume that the applicant “implicitly withdrew” his application if he did not appear for the interview, “unless the applicant demonstrates within a reasonable time that his failure was due to circumstances beyond his control”¹³⁵ – a far more stringent criterion than “good reasons”.¹³⁶

Article 10 provides for four further exceptions to the obligation to offer the opportunity of having an interview. First, the authority may decide not to hold the interview when “it is not reasonably practicable” because the applicant is “unable or unfit to be interviewed owing to enduring circumstances beyond his/her control.”¹³⁷ Article 10(2) lists the other three exceptions:

“The personal interview may be omitted where:

- (a) the determining authority is able to take a positive decision on the basis of evidence available; or
- (b) the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with filling his/her application and submitting the essential information regarding the application, in terms of Article 4(2) [QD]; or
- (c) the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application as unfounded in the cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply”.

Read in conjunction with the ground mentioned under (a), those addressed under (b) and (c) concern negative decisions that may be taken without an interview.

It follows from Article 10(2)(b) that the authority may decide to have the “meeting” take the place of the “interview”. Application of this exception would detract from the procedural safeguards offered by Article 10. Although most requirements on the personal interview are equally applicable to this meeting,¹³⁸ interview and meeting cannot be considered as equivalent. Whereas the interview serves to “allow applicants to present the grounds for their applications in a comprehensive manner”,¹³⁹ the meeting serves the purpose of assisting the filling of the application form and submitting “essential information” meant in Article 4(2) QD – first and foremost, travel and identity data and further the “reasons” for applying (cf. Article 10(2)(b) PD). Therefore, the meeting does not address assessment of, in particular, the applicant’s credibility, one of the purposes of the personal interview (cf. number [397]). Moreover, the applicant may not have stated all relevant information because he expected that he would be able to do so in the subsequent interview.

According to the exception under (c), no interview has to be held when the safe third country exception or the safe country of origin rule applies.¹⁴⁰ The arrangements on these matters in the Directive both explicitly allow for rebuttal of the assumption that the country of origin or the third country is safe (see numbers [446] and [527]). Obviously, omission of a personal interview seriously affects the possibility of effective rebuttal. The other grounds concern

applications that are “clearly unconvincing” (or some variant thereof) and subsequent applications.¹⁴¹

[400] Absence of an interview does not prevent the authority from taking a negative decision.¹⁴² But according to Article 10(5) PD, “absence of a personal interview pursuant to paragraph 2(b) and (c) and paragraph 3 shall not adversely affect the decision of the determining authority.” Arguably, the omission of the interview in case of a negative decision by definition adversely affects that decision. Maybe the provision purports that in case the determining authority has only the slightest doubt, it should not apply Article 10(2)(b) or (c), but hold the interview.

6.2.4.3 Standards on the special procedures

The preliminary procedure

[401] Pursuant to Article 24(a) PD, the ‘preliminary examination’ procedure may “derogate” from the basic principles and guarantees of Chapter II PD. Article 34 PD, on “procedural rules” for this procedure, states that

“Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 33 enjoy the guarantees listed in Article 9(1)”

- that is, they must be informed on the procedure, receive the services of an interpreter, not be denied the opportunity to communicate with UNHCR and be given notice in reasonable time of the decision on the application. Article 34(3)(a) PD states that if “the outcome” of the preliminary procedure is a negative decision, the applicant should be “informed” and the decision should be motivated - apparently not necessarily in writing, as Article 8 PD (that does not apply in this procedure) explicitly requires (see number [396]). As to the other basic principles and safeguards, Article 15(1) PD (guarantees for minors) applies on its own terms (thus not through reference in Articles 33 – 34 PD, see number [387]).

Arguably, the same holds true for Article 6(1), on the right to remain during the examination at first instance. Article 6(1) protects the applicant from expulsion until a “decision in accordance with the procedures at first instance set out in Chapter III” is reached, such as the ‘preliminary procedure’. Article 6(2) allows for an exception “where in accordance with Articles 33 and 34, a subsequent application will not be *further* examined” (emphasis added).¹⁴³ The exception of Article 6(2) PD therefore only applies *after* the

decision¹⁴⁴ has been taken that no new facts merit further examination in a new procedure. Until that decision is reached, the subsequent applicant has the right to remain pursuant to Article 6(1) PD. This reading finds confirmation in the Commentary on Article 6, stating that

“[t]he second paragraph refers to a new Article that allows Member States to have a special procedure for subsequent applications (see Articles 33 and 34). A preliminary procedure would allow member States to examine whether or not there is reasonable cause to “open a new asylum procedure”. *From the moment it is decided not to do so*, Member States are free to remove applicants from their territory on the basis of an earlier decision [emphasis added, HB].”¹⁴⁵

Object and purpose of Article 6 require that this protection from *refoulement* for subsequent applicants during preliminary examination should not be disregarded. The Preamble to the Procedures Directive mentions as an objective ensuring observance of the prohibition of *refoulement* as worded in Article 33 RC¹⁴⁶ and as a general principle of Community law, “in particular” as laid down in Article 19 Charter.¹⁴⁷

[402] In view of the few safeguards that apply in the preliminary procedure, the level of protection it offers is very low. The general requirements of Article 7 on examination do not apply – examination needs not be “appropriate”, nor is it to be conducted “individually, impartially and objectively”. Further, there is no explicit right to individual access to the procedure,¹⁴⁸ decisions need not be in writing, there is no right to a personal interview or to legal assistance or representation, the requirements on detention, on access of UNHCR and prudence as to disclosure of information to persecutors all do not apply.

Safeguards on the normal border procedures

[403] According to Article 24(b) PD, states may derogate from Chapter II principles and safeguards in ‘normal border procedures’, but Article 35(1) states that

“Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide, at the border or transit zones of the Member State, on the applications made at such locations”.

The Member States may provide that “another authority” than the specialised asylum agency (the “determining authority” as addressed in Article 3A(1) PD) is responsible for processing claims in this procedure, so border guards may examine and decide in this procedure. But as observed previously, this has no consequences for the application of the “basic principles and guarantees” of

Chapter II (see number [389]). So after all, there is no difference between the ‘normal examination’ and the ‘normal border procedure’ as to the requirements that apply to examination and decision-making.

Special border procedures

[404] The special border procedures that can be maintained pursuant to Article 35(2) may derogate from Chapter II (Article 24(b) PD).¹⁴⁹ Article 35(3) PD states that these procedures

“shall ensure in particular that the persons concerned:

- shall be allowed to remain at the border or transit zones of the Member State, without prejudice to Article 6;¹⁵⁰ and
- must be immediately informed of their rights and obligations, as described in Article 9 (1) (a); and
- have access, if necessary, to the services of an interpreter, as described in Article 9 (1) (b); and
- are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 10 to 12; and
- can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 13 (1); and
- have a representative appointed in the case of unaccompanied minors, as described in Article 15 (1), unless Article 15(2) or (3) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why his/her application for asylum is considered as unfounded or as inadmissible.”

Notably absent are the general requirements on the competent authority laid down in Article 7 that stipulates that decisions are taken impartially and objectively; and the right to individual access (Article 5). It is not required that a negative decision is put down in writing; the requirement to give notice of a decision “in reasonable time” does not apply, nor the right to be informed about the result of the decision to challenge it before a court or tribunal; nor has the failed applicant any right to free legal assistance in such circumstances.¹⁵¹ Further, the safeguards on the appropriate conduction of a personal interview ex Article 11 do not apply,¹⁵² nor do the requirements on detention or access by a legal counsellor in detention.¹⁵³ Finally, it is not required that the applicant in this procedure could communicate with UNHCR.¹⁵⁴

Safe third neighbouring country procedures

[405] According to Article 24(2) PD, in the safe neighbouring country procedure (Article 35A PD) derogation may be made from any principle or guarantee laid down in Chapter II PD. But pursuant to Article 35A PD, a few safeguards do nevertheless apply. It must be “established on the basis of the facts” that this procedure applies.¹⁵⁵ As the decision to apply the procedure is subject to appeal,¹⁵⁶ we may assume that some record of this decision and these facts should be made, but the Directive does not explicitly state so. Further, when “implementing” such a decision, that is, when expelling the alien without previous examination of his claim, the “authorities” must “inform” him thereof and give a document for the authorities of the third state to inform them that no examination of the substance of the claim has taken place.¹⁵⁷

6.2.5 Conclusions

[406] The Procedures Directive secures only to a limited extent that a meaningful and rigorous scrutiny is made of applications for protection, as required by relevant international law (cf. number [370]). It states a number of safeguards that, no doubt, importantly contribute to a meaningful examination of the claim, such as the prohibition on expulsion during the examination, the right of the applicant to be properly informed, the right to an interpreter and the right to a personal interview (numbers [392], [396] and [397]). However, the Procedures Directive allows for exceptions from these safeguards that, if applied by the Member States, may seriously affect the effectiveness of the protection. As far as the safeguards stated in Chapter II serve to secure compliance with international law, making exception to them may lead to variance with relevant international law standards.

The Procedures Directive allows for derogation from some or most safeguards in the ‘special border’, the ‘preliminary’ and the ‘safe neighbour country procedure’. For example, the prohibition of expulsion before examination does not apply in the ‘safe third neighbouring country procedure’, and the applicant has no right to a personal interview in the ‘preliminary procedure’ (numbers [405] and [402]). Processing applications in these special procedures in the absence of these and other safeguards might result in *refoulement*.

Further, in all procedures certain exceptions to various safeguards are allowed for. Thus, the right to a personal interview may suffer exception in all procedures on grounds that find no justification in international law. The denial of the opportunity to state grounds in a personal interview in case a

third country or the country of origin is generally considered as safe affects the possibility of rebuttal, required by international law (see number [399]). A most serious flaw is finally the failure to secure that each application is considered individually (number [394]). The Procedures Directive allows Member States to provide that applications may be made on behalf of dependant adults and minors. Once these dependants have consented, they have forfeited the right to a personal interview. Consequently, all procedures may result in negative decisions where no meaningful assessment of individual circumstances of those dependants have taken place at all.

6.3 Appeal procedures

6.3.1 Standards of international and Community law

[407] As observed under number [365], international law does not specifically regulate asylum procedures. But a number of provisions of international law do address appeal proceedings in general and are or might be of consequence for asylum proceedings. I will subsequently discuss rules of international law on access to the court and the right to fair trial (Articles 14 CCPR, 16 RC and 6 ECHR), the right to an effective remedy from violations of the European Convention and the Covenant (Articles 13 ECHR and 2(3) CCPR), the implications of Article 33 RC and, finally, relevant general principles of Community law and Article 47 Charter, which are informed by relevant international law.

The right to access to the court and to fair trial

[408] According to Article 14 CCPR,

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The right to a (fair) trial is thus confined to “the determination of rights and obligations in a suit at law”. May we assume that procedures on expulsion decisions fall within the scope of the right to a fair trial?¹⁵⁸ The term “suit at law” in the English language version refers to civil proceedings; the same holds true for the French and Russian language versions.¹⁵⁹ The views of the Human Rights Committee offer no clue for assuming that this restriction to the scope of Article 14(1) no longer applies.¹⁶⁰ Rather, the Committee holds the

view that as Article 13 (discussed in number [467] below) “speaks directly” on the right to a remedy in expulsion cases, and as it “incorporates notions of due process also reflected in Article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of Article 14 directly”.¹⁶¹ In summary, there are not sufficient grounds to assume that Article 14 CCPR applies to asylum procedures.

[409] According to Article 16 RC,

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.”

Does Article 16 RC grant a right of appeal to a domestic court against decisions on admission or the determination of refugee status?¹⁶² The provision merely addresses the issue of access to the court, not the content of proceedings. In particular, the notion of equal treatment in Article 16(2) addresses matters concerning access to the court, not what kind of subject matter should be open to appeal before a court.¹⁶³ Hence, Article 16 RC has no implications for asylum procedures.

[410] Article 6(1) of the European Convention of Human Rights,¹⁶⁴ the right to a fair trial, implies a right to have a claim concerning one’s “determination of civil rights and obligations” and “criminal charges” brought before a court or tribunal.¹⁶⁵ However, it does not apply to expulsion cases. In its judgement *Maaouia* the European Court of Human Rights decided that decisions by the states concerning entry, stay or deportation of aliens do not concern the determination of civil rights and obligations nor a criminal charge within the meaning of Article 6(1) ECHR.¹⁶⁶ The standards of Article 6(1) ECHR however do apply as general principles of Community law (see below number [417]).

Effective remedy from violations of Article 3 ECHR and 7 CCPR

[411] Article 13 ECHR provides, as far as relevant for present purposes, that “Everyone whose rights and freedoms as set forth in this Convention

are violated shall have an effective remedy before a national authority [...]”.

Thus, the Contracting states must provide individuals, whose rights have been violated, with an “effective remedy” before a “national authority”. According to well-established case law of the European Court of Human Rights, the right to an effective remedy applies not only when a violation has taken place, but also in case of an “arguable claim” or “arguable complaint” of such a violation.¹⁶⁷

When is a claim “arguable”? The European Court of Human Rights has never given a definition,¹⁶⁸ but its case law offers some guidelines. A remedy for “unmeritorious” claims is not required.¹⁶⁹ Further, “in principle” the same threshold applies as to appeals to the Strasbourg organs.¹⁷⁰ The European Court of Human Rights declares appeals “inadmissible for manifest ill-foundedness” if “there is not even a *prima facie* case against the respondent state”.¹⁷¹ Thus, in principle a complaint is not arguable if there is no *prima facie* risk of *refoulement*.

Occasionally, the European Court of Human Rights has considered complaints under Article 13 ECHR although the claim under Article 3 ECHR was “manifestly unfounded”.¹⁷² But in a recent admissibility decision, it stated that an applicant had no “arguable claim”, as his complaint of violation of Article 3 ECHR was “manifestly ill-founded”.¹⁷³ So in sum, Article 13 ECHR requires an effective remedy in expulsion proceedings, unless there is no *prima facie* risk that the expulsion would violate Article 3 ECHR.

[412] The authority that should offer the remedy “may not necessarily in all circumstances be a judicial authority in the strict sense”, but if it is not, its powers and the guarantees as to its impartiality and independence are relevant in determining whether the remedy is effective.¹⁷⁴ For a remedy must satisfy two requirements in order to be effective. Firstly, it must allow the competent authority to deal with the “substance” of the complaint (see below). Secondly, the remedy must allow the authority to grant the protection seeker appropriate relief,¹⁷⁵ i.e. it must be competent to quash the decision to expel¹⁷⁶ and to suspend its implementation (the expulsion).¹⁷⁷ The scrutiny on both requirements must be both “independent” from the scrutiny by the decision maker,¹⁷⁸ as well as “rigorous”.¹⁷⁹ In *Jabari*, the European Court of Human Rights further explicitly stated that even if the authority that decided at first instance has made “no assessment [...] of the applicant’s claim to be at risk [of ill-treatment] if removed”, the appeal authority should address “the substance of the applicant’s complaint”.¹⁸⁰

[413] Hence, a remedy is effective only if the competent authority can deal

with the substance of the claim, that is, consider the appeal on its merits. Just *how* “rigorously” it should consider those merits is somewhat unclear. Does the effectiveness requirement entail that the competent authority can submit a decision to a full judicial review, or does a limited judicial review suffice? And should the authority be competent to reach findings of fact for itself?¹⁸¹

These issues have been brought forward in a couple of cases where applicants complained that the remedy afforded by UK courts was not effective for the purposes of Article 13 ECHR, because of the applied standard of judicial review.¹⁸² The European Court however accepted that standard of review as sufficiently effective, observing that the test as applied in expulsion cases does not allow for “a wide area of discretion afforded to the authorities”.¹⁸³ Further, in both *Hilal* as well as *Bensaid* the Court renders the “relevant domestic practice”, the way in which UK courts apply this standard of review as follows:

“the domestic court’s obligation on an irrationality challenge in an Article 3 case is to subject the Secretary of State’s decision to rigorous examination and this it does by considering the underlying factual material for itself to see whether it compels a different conclusion to that arrived at by the Secretary of State. [...] In circumstances such as these, what has been called the ‘discretionary area of judgement’ - the area of judgement within which the Court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant’s removal is a decidedly narrow one [emphasis added, HB].”¹⁸⁴

It appears that the Court accepts that the UK standard of review as it is rendered here, is “effective” for the purposes of Article 13 ECHR. In itself, it does not follow that that Article 13 ECHR requires that the appeal authority considers the facts for itself, and that the area of judgement left to the decision maker is “a decidedly narrow one”. But arguably, a judicial authority that cannot consider the facts, and that does allow the decision-maker a considerable degree of discretion, would not perform an “independent and rigorous scrutiny” of the substance of the claim as required by Article 13.

Moreover, both requirements on the domestic remedy follow from the very system of human rights protection under the Convention. The obligation to ensure that the rights and freedoms laid down in the European Convention are being observed lies primarily with the Contracting states. In order to perform under this obligation, the States must establish, pursuant to Article 13 ECHR, an independent authority that can offer redress in individual cases. The Court’s surveillance of the state’s compliance to the Convention is subsidiary to this surveillance by domestic courts.¹⁸⁵ This tenet is reflected in the requirement for

admissibility before the Strasbourg organs, that all domestic remedies have been exhausted.¹⁸⁶ If domestic procedures offered lesser procedural safeguards than the appeal procedure in Strasbourg, the latter would lose its subsidiary nature. And the European Court does, if necessary, do findings of facts for itself,¹⁸⁷ and its review in expulsion cases under Article 3 ECHR can only be described as full.

[414] Finally, the procedure before the European Court provides for some guidance as to the implications of the requirement of effectiveness. In *Mamatkulov I*, the Court elaborated upon the implications of the “effective exercise of the right of appeal” to the Court under Article 34 ECHR: the principle of “equality of arms” and “the applicant’s right to sufficient time and sufficient facilities in which to prepare his or her case” should be respected.¹⁸⁸ Because of the subsidiary nature of the Court’s scrutiny, domestic asylum procedures should at least offer the same level of procedural protection as the Court’s procedures do. Both principles therefore apply to domestic asylum proceedings.

Article 2(3) CCPR

[415] Article 2(3) CCPR provides that

“Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.”

Article 2(3) CCPR confers an obligation similar to the one laid down in Article 13 ECHR. The Human Rights Committee appears to follow the case law of the European Court, where it only requires that a person has a ‘claim’ that his CCPR rights have been violated, rather than that these violations had already occurred before Article 2(3) can apply.¹⁸⁹ It does not follow from the Committee’s views that Article 2(3)(a) sets stricter requirements on the effectiveness of the remedy than Article 13 ECHR does.¹⁹⁰

In addition to Article 13 ECHR, Article 2(3)(b) requires that the Contracting states “develop the possibilities of judicial remedy”. According to Boeles, it follows that the notion of an “effective remedy” ex Article 2(3) CCPR should be understood as an appeal to the judiciary, unless the nature of the human rights violation and the nature of the domestic judicial system render intervention by another authority more effective.¹⁹¹ Boeles goes on to say that states cannot turn back an already developed judicial remedy; and at a certain moment in time, the development of judicial remedy must be completed. But arguably, the provision rather suggests a certain margin of appreciation for the states to choose the authority that should offer the remedy,¹⁹² and the wording of the provision is too general to infer from it a standstill clause. In summary, it appears that Article 2(3) has little if any significance for protection procedures in the European Union next to Article 13 ECHR.

The prohibitions of refoulement

[416] The prohibitions of *refoulement* set conditions on asylum proceedings (see number [365]), and hence also on appeal proceedings. Next to Articles 13 ECHR and 2(3) CCPR, Articles 3 ECHR and 7 CCPR have little practical meaning (see, however, number [499]). As to Article 33 RC, we saw above that the provision does not require specific types of asylum procedures. In particular, the provision does not require appeal proceedings. This follows from a reading in accordance with Article 32 RC. The latter provision, on expulsion of “lawfully present” refugees, explicitly requires the opportunity to appeal to a court (see under paragraph 6.5.1). It follows that this opportunity is not implied by the prohibition on expulsion. It would be unreasonable to assume that it is implied by the prohibition on *refoulement*.¹⁹³

But if Contracting states do set up appeal procedures, they must give full effect to Article 33 RC (number [365]). Most important in this respect is the obligation not to expel unrecognised refugees (asylum seekers) pending appeal proceedings, provided their claim meets a certain threshold. Article 33 RC demands so for two reasons. Firstly, because of the irreparable nature of expulsion, i.e. the effectiveness principle. Secondly, the fact that in status determination procedures the refugee is usually the most important source of proof. This requires his presence for proper decision-making by the highest authority concerned – that is, if domestic law provides for appeal to a court, the judiciary. Accordingly, the UNHCR Handbook states that the applicant “should be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending”.¹⁹⁴ Confirmation can be found in a judgement by the Dutch Supreme Court. In *Mosa II*, it stated that

pursuant to Article 33 RC, appeal against a negative decision on a claim for refugee status must suspend expulsion, unless it has been established beyond reasonable doubt that the alien is not a refugee.¹⁹⁵ This standard is quite similar to the “arguable claim” threshold that applies under Articles 13 ECHR and 2(3) CCPR.

Community law requirements

[417] The Preamble to the Procedures Directive observes that

“It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of a refugee status must be subject to an effective remedy before a court or tribunal in the meaning of Article 234 of the Treaty establishing the European Community. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole”.¹⁹⁶

Indeed the Luxembourg Courts have elaborated a set of general principles of Community law that have to do with the right to a fair trial, such as the “principle that everyone is entitled to fair hearing or a process within a reasonable time”,¹⁹⁷ the “principle of equality of arms” in administrative proceedings,¹⁹⁸ and the “principle of effective legal protection” whereto the PD Preamble refers (the content of the latter principle will be discussed extensively in paragraph 9.1.1).¹⁹⁹

According to well-established case-law of the European Court of Justice, these principles are inspired by Article 6 and Article 13 ECHR.²⁰⁰ But importantly, unlike the European Court of Human Rights (see number [410]), the European Court of Justice has never limited the scope of the principles inspired by Article 6 ECHR to “civil rights and obligations or criminal charges”. Rather, it appears that “everyone” is entitled to the protection afforded by these principles. The issue was touched upon in *Z v European Parliament*.²⁰¹ Z complained that the Community authorities had not observed some time limit laid down in a Staff Regulations provision in the disciplinary proceedings against him. He stated that the proceedings were therefore not in accordance with his right to fair hearing within a reasonable time under Article 6(1) ECHR. The European Court of Justice stated:

“As regards the argument based on Article 6(1) of the Convention, and without there being any need to determine whether that provision is applicable to the disciplinary proceedings provided for in the Staff Regulations, it should be recalled that *Article 6(1) provides that in the determination of his civil rights or obligations or of any criminal charge against him, every-*

one is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law. As its wording clearly shows, Article 6(1) of the Convention does not lay down precise time-limits [...] As regards the application of the general principle of Community law that everyone is entitled to legal process within a reasonable period see Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraph 21) [...; emphasis added, HB].”²⁰²

Thus, the European Court of Justice distinguishes between on the one hand the testing to the wording of Article 6(1) ECHR (which as the Court suggests may not apply to the disciplinary proceedings), and on the other hand the testing to the Community principle. The Court of Justice implies here that restrictions on the scope of Article 6 ECHR do not apply to the general principle of Community law.

[418] Hence, the case-law of the European Court of justice suggests that the general principles of Community law inspired by Article 6 ECHR apply to any proceeding, not only to those on civil rights and obligations or criminal charges. Advocate General Alber explicitly stated that the procedural safeguards meant in Article 6 ECHR apply to any “right ‘guaranteed by the law of the Union’”.²⁰³ He referred in that connection to Article 47 of the Charter of Fundamental Rights. According to this provision,

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.”

The first paragraph corresponds to the text of Article 13 ECHR, save for the requirement that the remedy should be “before a tribunal”. The right to a fair hearing in the first clause of the second paragraph corresponds to the first clause of Article 6 ECHR. The second clause of the second paragraph has no literally corresponding counterpart in Article 6 ECHR; probably it is inspired by Article 6(3)(c) ECHR (that applies to criminal charges).²⁰⁴ The third paragraph of Article 47 is, according to the Explanation, a codification of relevant case law by the European Court of Human Rights on Article 6; finally, the Explanation states that “the guarantees afforded by the ECHR apply in a similar way to the Union.”²⁰⁵

[419] Thus, Article 47 Charter encompasses all procedural safeguards afforded by Articles 6 and 13 ECHR. The absence of a restriction to “the determination of civil right and obligations” as in Article 6(1) ECHR appears to be intentional: according to the Explanation, it follows from the case law of the European Court of Justice that this restriction does not apply to Union (Community) law.²⁰⁶ It would follow that asylum proceedings do fall within the scope of the provision.

But the wording of the provision nevertheless yields some uncertainty on its scope of application. Pursuant to the first paragraph of Article 47, read in accordance with the relevant case law of the European Court of Human Rights (cf. number [411]), anyone who has an “arguable claim” that his Union rights are or will be violated is entitled to the protection afforded by the provision.²⁰⁷ Article 6(1) ECHR however “secures to anyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal”.²⁰⁸ Hence, Article 6(1) ECHR applies to a mere claim, not only to “arguable” claims. Should we assume that Article 47 Charter does not apply to claims that are not arguable? Arguably, we should not. It follows from object and purpose of the Charter as well as from the Explanation to Article 47 Charter that the difference in wording from Article 6 ECHR was meant to expand the scope of application, and not to set a higher threshold. Article 52(4) Charter corroborates this reading.²⁰⁹ So despite the text of the first paragraph of Article 47 Charter, we may assume that the right to access to a Court and the relevant standards apply to any claim concerning a Union right. In fact, the provision would then apply in case of a “*contestation*” on a Union right.²¹⁰

Conclusions

[420] The obligations as to appeal proceedings resting on the Member States pursuant to international law amount to the following. The Member States must provide for an effective remedy against a decision to expel if the alien can present an “arguable claim” that expulsion will result in ill treatment (Articles 13 ECHR and 2(3) CCPR). A claim is arguable for the purposes of Article 13 ECHR if the claimant runs *prima facie* a real risk of ill treatment upon expulsion. The remedy must satisfy several conditions. The “authority” that is to offer the remedy must perform an independent and rigorous scrutiny (Article 13 ECHR). This implies that it can do findings of fact for itself, and that the review of the decision to expel is not limited to issues of law (Article 13 and 3 ECHR). The principle of equality of arms applies, and the applicant should be offered sufficient time and facilities to prepare the case (Article 34 read in conjunction with 13 ECHR, see number [414]). The authority must

have the power to suspend expulsion of those who have an arguable claim that expulsion will result in ill treatment (Article 13 ECHR). Arguably, states cannot expel an alien who appealed to Article 3 ECHR without allowing him to apply for leave to remain to this authority, as it is this authority who decides on the arguability of the claim. If the alien claims to be a refugee, he cannot be expelled until the authority has decided upon the case unless it is beyond reasonable doubt that he is not a refugee (Article 33 ECHR).

International law has served as a source of inspiration for the general principles of Community law concerning appeal proceedings, as well as for Article 47 Charter. But these principles and this Charter provision offer in several respects more extensive protection. To begin with, they require an effective remedy if a right guaranteed by Community law is affected (the “arguable claim” requirement does not apply). Moreover, the obligations laid down in Article 6 ECHR apply to all Community rights (thus not only to “civil rights and obligations or criminal charges”) – including administrative proceedings, such as asylum procedures. It follows that under Community law, the effective remedy must be offered before a court or tribunal, and legal aid must be available.

6.3.2 CEAS provisions on appeal in asylum procedures

The Procedures Directive addresses three issues concerning appeal. First, it stipulates against which decisions applicants have “the right to an effective remedy before a court or tribunal”. Second, it states some procedural safeguards on appeal proceedings. Third, it imposes the obligation on Member States to issue domestic legislation on a number of issues concerning the organisation of appeal proceedings, and the safeguards that apply.

Scope of application

[421] According to Article 38(1),

“Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

- (a) a decision taken on their application for asylum, including a decision:
 - (i) to consider an application inadmissible pursuant to Article 25(2),
 - (ii) at the border or in the transit zones of a Member State as described in Article 35(1);
 - (iii) not to conduct an examination pursuant to Article 35A;
- (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

- (c) a decision not to further examine the subsequent application pursuant to Articles 33 and 34;
- (d) a decision refusing entry within the framework of the procedures provided for under Article 35(2)".

Article 38(1) PD does not make explicit mention of all negative decisions that may be taken in the procedure at first instance. Absent from the list is an explicit reference to the decision to reject a claim as unfounded (or manifestly unfounded) pursuant to Article 29 PD. But undoubtedly, any decision pursuant to Article 29 PD is "a decision on [an] application for asylum" as meant in Article 38(1)(a) (which gives a non-exhaustive list, cf. the term "including"). Not mentioned either is the decision to dismiss an application because another Member State is responsible according to the Dublin Regulation. Articles 19 and 20 of that instrument state that such decisions "may", not must, "be subject to an appeal or review". Hence, the Dublin Regulation leaves the Member States discretion in this matter. As argued under number [363], relevant domestic law is subject to the obligations imposed by the Procedures Directive. Therefore, Member States must offer an effective remedy before a court or tribunal from a decision to reject an application based on the Dublin Regulation pursuant to Article 38(1) first clause and under (a) PD. Finally, the decision to discontinue or reject the application in accordance with Articles 19 or 20 PD is not mentioned, but Article 38(1)(b) offers redress in such cases.

In summary, Article 38(1) PD requires the opportunity of a remedy against any negative decision in the asylum procedure, in accordance with relevant international and Community law.

Organisation

[422] The Procedures Directive provides for only a few rules on the organisation of appeal procedures. They must be before a court or tribunal.²¹¹ Domestic legislation "shall provide for time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy".²¹² Applicants may be required "to cooperate", which could entail *inter alia* a duty "to report in person" "at a specified time".²¹³ The Member States may provide for legislation on "the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned" the remedy.²¹⁴ Article 38(5) PD suggests another ground for a negative final decision: when the applicant has a status equivalent to refugee status by virtue of the Qualification Directive, he

"may be considered to have an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlike-

ly to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings”.

However, beneficiaries of subsidiary protection status are excluded from the right to family reunification set out in the Family Reunification Directive, which does contain a favourable arrangement for refugees (see paragraph 8.4.3). The Family Reunification Directive thus invests subsidiary protection beneficiaries with family members in the country of persecution with “sufficient interest” to challenge his failed request for refugee status.

Domestic law “may” provide for time limits for the court or tribunal to examine the decision by the determining authority.²¹⁵ In case the applicant is held in detention, Member States “shall ensure that there is the possibility of speedy judicial review”.²¹⁶

Safeguards

[423] Among the safeguards that the Procedures Directive imposes on appeal proceedings, the most important one is doubtless the requirement that they be “effective”.²¹⁷ Several safeguards laid down in the Directive serve to secure the effectiveness. Applicants (or their legal representatives) must be given notice “in reasonable time” of the decision at first instance.²¹⁸ Applicants must be informed about *inter alia* how they can “challenge a negative decision”.²¹⁹ During appeal procedures, they must receive the services of an interpreter for submitting their case whenever necessary and they must not be denied the opportunity to communicate with UNHCR.²²⁰ Important for the opportunity to challenge the decision effectively are further the requirements that the negative decision be motivated, and that the applicant has access to the report of the interview.²²¹ The appeal authorities must have “access” to the determining authority’s “general information” on the country of origin,²²² and to all information in the applicant’s file, “except where such access is precluded in national security cases.”²²³ These requirements serve the effectiveness of the access to the court (as required by Article 47 Charter).

[424] Importantly, in appeal proceedings free legal assistance must be provided on request.²²⁴ However, this obligation is subject to a number of exceptions. Member States may provide *inter alia* that free legal assistance is available only in appeal “in accordance with Chapter V” (i.e. Article 38 PD), thus not to further appeal, and/or only “if the appeal or review is likely to succeed”.²²⁵ Obviously, especially the last-mentioned ground seriously affects the effectiveness of the safeguard, and may amount to circular reasoning. The Directive appears to appreciate this where it states that

“Member States shall ensure that legal assistance and/or representation granted under subparagraph (d) is not arbitrarily restricted”.²²⁶

Arguably, in order to give this clause and the right to free legal assistance any meaning, we must assume that the decision on whether or not free legal assistance may be denied pursuant to Article 13(3)(d) PD must be taken by another authority than the determining authority (that issued the negative decision and hence by definition holds the view that the appeal is not likely to succeed). This reading is also warranted by the relevant general principle of Community law, as well as the right to legal aid laid down in the third clause of Article 47 Charter.

The counsellor should have access “to such information in the applicant’s file as is liable to be examined by” the court or tribunal, but only “insofar as the information is relevant for the examination”. Further exception may be made

“where disclosure of information or sources would jeopardise national security, the security of the organisations or persons providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised”.²²⁷

Obviously, restrictions to access to the applicant’s file may seriously affect the effectiveness of the remedy.

[425] An important issue is suspension of expulsion during appeal proceedings, required by Article 13 ECHR and Article 33 RC and relevant Community law.²²⁸ According to Article 38(3),

“Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:

- (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome; and
- (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome.

Member States may also provide for an *ex officio* remedy”.

Thus, the Procedures Directive acknowledges that the matter is relevant for performance under relevant international law, but leaves the organisation to domestic legislation.

As to appeal against negative decisions based on the Dublin Regulation, Articles 19(2) and 20(1)(e) DR state that the appeal (or review)

“shall not suspend the implementation of the transfer unless the courts or

competent bodies so decide on a case by case basis if national legislation allows for this.”

Should we assume that the Member States are prohibited from adopting or maintaining legislation stating that appeal suspends expulsion? Vermeulen observes that this implication would be at variance with the subsidiarity principle.²²⁹ Further, the legal basis of procedural rules in the Dublin Regulation is not Article 63(1)(a), but 63(1)(d) TEC (see number [187]). The Dublin rules on suspension are hence minimum standards that allow Member States to retain or introduce legislation departing from Articles 19 and 20 DR to the benefit of applicants. Suspension of expulsion until the appeal authority has reached a final decision by virtue of legislation, secures protection from *refoulement* far better than the possibility of requesting it during appeal proceedings. Arguably, then, Article 19 and 20 DR should be read as allowing for such legislation.

6.3.3 Conclusions

[426] The Procedures Directive addresses a number of the standards set by international law on appeal procedures. According to Article 38(1) PD, all types of negative decisions on an application must be open to a remedy, and this remedy must be offered before a court or a tribunal. Both requirements are in excess of international law standards (that require a remedy only in case of an “arguable claim”, and not necessarily before a court), and in compliance with relevant Community law (number [420]). In this context, the grounds for inadmissibility ex Article 38(5) deserve attention: it states that appeal against a negative decision on an application for refugee status by subsidiary protection beneficiaries can be declared inadmissible, if under national law this applicant is entitled to all benefits that the Qualification Directive bestows on refugees. This denial of access to a remedy is not at variance with Articles 33 RC, 3 read in conjunction with 13 ECHR or Article 7 read in conjunction with 2(3) CCPR, as the subsidiary protection status protects the applicant from *refoulement*. But the rules on family reunification in the Family Reunification Directive that apply only to refugees (see numbers [583] and [598]) may invest the applicant with sufficient interest in appeal from the negative decision on his application for refugee status. Inadmissibility would then be at variance with relevant principles of Community law, and with Article 47 Charter.

Article 38(1) PD further requires that the remedy be “effective”, in accordance with both international and Community law. But the Procedures Directive secures the effectiveness of the remedy only partially. The important

matter of suspension of expulsion during appeal proceedings is left to domestic legislation, subject to the condition of accordance with international law. Another important issue is not addressed at all: the scope of judicial review. And the right to legal aid and to access to the files allows for many exceptions, which may seriously affect the “rigorousness” of the review by the court, as required by international law. Thus, Article 38 PD secures the right to an effective remedy as laid down in international law only partially.

6.4 Grounds for refusal

The CEAS establishes six grounds for refusal of a request for protection: (1) inadmissibility; (2) the decision not to continue the examination because of withdrawal of the application; (3) the decision not to further examine a subsequent application; (4) manifest unfoundedness; (5) unfoundedness otherwise, and (6) application of the safe third neighbouring country procedure.

In the following paragraphs, I briefly discuss the grounds for inadmissibility (in paragraph 6.4.1), the decision to discontinue examination and the grounds for manifest unfoundedness (in paragraphs 6.4.2 and 6.4.3). The Procedures Directive elaborates on three particular grounds for refusal, which therefore merit more detailed discussion. First, subsequent applications (addressed in par. 6.4.4); second, the concept of the ‘safe country of origin’ (addressed in paragraph 6.4.5) and third, requirements on application of the safe third country exception. These rules, including the Dublin allocation rules, are discussed separately, in Chapter 7. Grounds for considering an application as unfounded “pursuant to the Qualification Directive” (cf. Article 29(1) PD) were discussed in Chapter 5.

6.4.1 Inadmissibility

[427] According to Article 25 PD, Member States “may” consider applications inadmissible on nine grounds, which address three types of cases:

- (1) the exception of the safe third country as regulated in Article 26 or 27 PD applies;²³⁰
- (2) the applicant lodged an “identical” application after a final decision, or is a “dependant” of another applicant, and consented in making his own application part of the latter’s, and presented no facts justifying a separate application;²³¹
- (3) the applicant enjoys refugee status in another Member State²³² or “equiva-

lent” protection in the Member State where he applied,²³³ or has applied for such equivalent protection.²³⁴

Is the decision to apply the Dublin Regulation an admissibility decision? The Procedures Directive is somewhat indeterminate on the matter. On one hand, it addresses this decision under the heading “cases of inadmissible applications”, but on the other hand it avoids labelling it as “inadmissible”.²³⁵ The reason for avoiding this label could be, that when the Dublin Regulation is applied, the exception from the obligation to examine follows from the Dublin Regulation, not from the Procedures Directive.²³⁶ But as far as considering qualification for protection status is concerned, the decision not to examine the merits of a claim because another Member State is responsible (Articles 19(2) and 20(1)(f) DR) and an inadmissibility decision based on Article 25 PD amount to the same. Hence, we may classify the Dublin decision under the first group of grounds for inadmissibility.

[428] The first type of grounds for inadmissibility, all variants of the safe third country exception, will be discussed in Chapter 7. The second type concerns subsequent applications, to be discussed in paragraph 6.4.4.

The rationale behind the third type of grounds seems to be absence of interest: the applicant already enjoys protection. The assumption that recognition as a refugee by another state amounts to sufficient protection may also be seen as a particular type of the safe third country exception, and will be discussed in that context (see further paragraph 7.5.4). Inadmissibility because the applicant enjoys “a status equivalent to the rights and benefits of refugee status by virtue of” the Qualification Directive reflects the assumption that Directive refugee status is up to the standards set by international law. This assumption is unjustified, if only because the Qualification Directive does not address the full range of Refugee Convention benefits (see further paragraph 8.4.2). Moreover, the benefits of the Family Reunification Directive apply only to recognised refugees, not to persons enjoying some “equivalent” status. Declaring a claim to refugee status inadmissible on the grounds of Article 25(2)(d) PD would entail denial of those benefits. Arguably, Member States may therefore not apply this ground for inadmissibility when the applicant can claim the relevant Refugee Convention or Family Reunification benefits.

6.4.2 Withdrawn applications

[429] The second type of grounds for refusal of a request for protection con-

cerns withdrawn applications.²³⁷ The Procedures Directive distinguishes between applications that are “explicitly”, and those that are “implicitly” withdrawn (Articles 19 and 20 PD).

As to the first category, the Member States whose domestic law does “foresee the possibility of explicit withdrawal of the application” must in case of explicit withdrawal decide either to “reject” or to “discontinue” the examination²³⁸ or “enter a notice” to the same effect in the applicant’s file. As the decision to discontinue examination is not open to appeal (see number [421]), entering a notice instead of taking a decision does not in itself affect the legal position of the applicant.

As to implicitly withdrawn applications, Member States must ensure that the determining authority decides to “discontinue” or “reject” the examination when “there is reasonable cause to consider” that the applicant has either “implicitly withdrawn”, or “abandoned” his application.²³⁹ Apparently, this obligation applies also if domestic law did not “foresee the possibility of” implicit withdrawal or abandonment.²⁴⁰ Member States “may” (not must) consider that the applicant implicitly withdrew his request “in particular” in two situations. First, if the applicant

“has failed to respond to requests to provide information essential to his/her application in terms of Article 4 [QD], or has not appeared for an personal interview as provided for in Articles 10, 11 and 12 [PD], unless the applicant demonstrates within a reasonable time that his failure was due to circumstances beyond his control.”²⁴¹

Second, the application has implicitly been withdrawn if the applicant left without authorisation the place where he lived or was held, and did not contact or report in time.²⁴²

Pursuant to the arrangement on “implicitly withdrawn” applications, Member States may sanction failure to comply with procedural requirements by rejecting the claim. According to relevant international law, procedural requirements should “normally” be complied with (see number [369]). The sanction of rejection is in itself not in violation of international law, provided that the alien can still effectively invoke the prohibitions of *refoulement*. Whether he can, will be discussed in the context of subsequent applications (paragraph 6.4.4).

6.4.3 Manifestly unfounded applications

[430] The third type of grounds for refusal, “manifest unfoundedness or mani-

festly unfounded”, is established in Article 29(2) PD that provides that “In the cases mentioned in Article 23(4)(b) and in cases of unfounded applications for asylum in which any of the circumstances listed in Article 23(4)(a) and (c) to (o) apply, Member States may also consider an application, if it is so defined in the national legislation, as manifestly unfounded”. So, Member States may label cases where one of the grounds for refusal listed in Article 23(4) applies as “unfounded” cases, or as “manifestly unfounded” ones. Oddly, the concept of “manifest unfoundedness” lacks any legal consequences under the Procedures Directive.²⁴³ According to the first clause of Article 23(4) PD, the listed (manifestly) unfounded cases may be dealt with in the “accelerated” or “prioritised” procedure. But so may “any” case, pursuant to Article 23(3) PD (cf. number [376]). Articles 23(4) and 29(2) PD appear to be the remnants of an arrangement in earlier drafts that was not adopted.²⁴⁴

[431] For the purposes of European asylum law, the fifteen grounds listed in Article 23(4) PD are therefore mere examples of unfounded claims. They concern five types of cases:

- (1) the case is manifestly unfounded in the narrow sense: the applicant raised issues that are “not relevant or of minimal relevance” for examination of the merits, or the applicant “clearly” does not qualify,²⁴⁵ the applicant’s statements are of such a kind that they make his claim “clearly unconvincing”,²⁴⁶ or he made the application “merely in order to delay or frustrate” expulsion based on an earlier decision;²⁴⁷
- (2) the safe third country or safe country of origin arrangements apply;²⁴⁸
- (3) the applicant lied or committed fraud²⁴⁹ or he is not co-operative;²⁵⁰
- (4) the applicant “is a danger to the national security or the public order of the Member State”,²⁵¹ or
- (5) the applicant made a subsequent application, or he is a minor and the application of his parents was rejected (and he stated no relevant new facts).²⁵²

[432] The fifth group, subsequent applications, will be addressed in paragraph 6.4.4; as to the second group, the safe country of origin concept is discussed in paragraph 6.4.5 and the safe third country exception in Chapter 7. Here, we should briefly address the relation of the first, third and fourth type with the Qualification Directive. How are these grounds of (manifest) unfoundedness classified in the terms of the latter instrument?

The first type, manifestly unfounded cases in the narrow sense, concerns cases where the applicant has (“clearly”) not sufficiently substantiated his

claim. We should observe that if “aspects” of the claim are not supported by evidence, they need no confirmation if the requirements of Article 4(5) QD are fulfilled (see number [283]). Hence, application of Article 23(4)(a) and (b) is limited by Article 4 QD.

The third category concerns, in the terms of Article 4(1) of the Qualification Directive, cases where the applicant failed to substantiate his claim by submitting the elements mentioned in Article 4(2) QD, and hence did not fulfil the requirement ex Article 4(5)(a) QD (see number [283]). As far as the qualification is concerned, these cases therefore all amount to one ground for unfoundedness.

The fourth ground concerns rejection of the application because the applicant “is a danger to the national security or the public order of the Member State”. We may observe that Article 14(6) of the Qualification Directive establishes a special status of sorts for persons who qualify as refugees in the sense of Article 2(c) QD, but who may be expelled in accordance with Article 33(2) RC because they are a danger to the security or community of the Member State (cf. number [342]). Simple rejection of the application after finding that one of these grounds applies entails denial of the benefits listed in Article 14(6) QD. In order to comply with Article 14 QD, Member States should therefore examine whether such an applicant qualifies as a refugee under Article 2(c) QD.

6.4.4 Subsequent applications

6.4.4.1 Introduction

[433] According to the Preamble to the Procedures Directive, subsequent applications warrant special procedural rules:

“[w]here an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure”.²⁵³

If it has been established in a previous procedure that an applicant is not eligible for refugee or subsidiary protection, assessment of exactly identical facts and circumstances upon a subsequent application would lead to the same outcome. Hence, Member States are indeed justified in requiring that applicant states “new” facts, that is, facts that were not assessed in the previous examination.

But the procedural requirements on facts or circumstances that the subsequent applicant should submit may not result in raising the burden or standard

of proof applicable under Article 1A(2) read in conjunction with 33 RC or the other prohibitions of *refoulement*.²⁵⁴ These prohibit expulsion in the case that the alien has a well-founded fear of persecution or runs a real risk of ill-treatment upon expulsion. In a subsequent as well as in a first procedure, the assessment of this fear or risk of must include all relevant facts and circumstances at the time of taking the decision on the application.²⁵⁵ The circumstance that some relevant fact has not been stated in a previous procedure does therefore not affect its relevance for the assessment of the applicant's fear or risk. Hence, the grounds stated in the subsequent application should be "new" only in the sense that they were not assessed in the previous procedure. Further, the "new" grounds need not, taken alone, suffice to substantiate the claim. Rather, they should be assessed together with all other relevant facts and circumstances – including those addressed in the previous examination.

[434] In the Procedures Directive, three types of such "subsequent applications" can be distinguished. First, applications that were lodged after a decision on a previous application was reached. Second, applications that were lodged after the applicant consented to the lodging of an application by a partner or parent on his behalf. Third, applications that were lodged after the previous one was explicitly or implicitly withdrawn. In order to distinguish these types I will refer to them as 'repeated application', 'application by a dependant' and 'application after withdrawal'; 'subsequent application' serves as the generic term that covers all three types. The several arrangements for dealing with each these types of subsequent applications are discussed in paragraphs 6.4.4.3, 6.4.4.4 and 6.4.4.5; paragraph 6.4.4.2 deals with an arrangement that may apply to several types.

6.4.4.2 Subsequent applications lodged during the processing of the former application

[435] A "subsequent application" as well as "further representations" may be examined "in the framework" of the examination of the first application or appeal proceedings against the earlier decision, "insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework".²⁵⁶ Thus, if a new application or new facts and circumstances are submitted before a final decision was reached on the earlier application, the Member States may deal with them in those proceedings.

This arrangement applies, it appears, both to ‘repeated applications’ as well as to ‘applications by dependants’.²⁵⁷ The Procedures Directive gives no rules for how the Member States should deal with subsequent submissions during the previous procedure.

In one case, the Procedures Directive explicitly provides for a new, subsequent procedure before the previous procedure has come to an end. A subsequent application lodged after the decision at first instance, hence before a “final decision” in the previous procedure was reached (when appeal against that decision is still open),²⁵⁸ may also be dealt with in the ‘preliminary procedure’.²⁵⁹ This arrangement will be discussed immediately below.

6.4.4.3 Repeated applications

[436] Repeated applications lodged after a final decision may be dealt with in the ‘preliminary procedure’ (Articles 33 and 34 PD), or in other procedures be dismissed as ‘inadmissible’ (Article 25(2)(f) PD) or as ‘manifestly unfounded’ (Article 23(4)(h) PD). These provisions state different criteria for deciding whether the repeated application merits examination.

If considered in the ‘preliminary procedure’, the repeated application must according to Article 33(3) read in conjunction with (4) PD be “further” examined in the ‘normal examination’ or ‘border procedure’²⁶⁰ if

“new elements or findings arise or have been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of [the Qualification Directive]”

(or of his qualifying as a person eligible for subsidiary protection, we may assume; cf. number [362]). Member States “may, in accordance with national law”, further examine the repeated application “for other reasons” also.²⁶¹

Article 25(2)(f) PD states that an application may be declared inadmissible if “the applicant has lodged an identical application after a final decision”. Member States may declare the repeated application manifestly unfounded, if “no relevant new elements were raised with respect to his/her particular circumstances or to the situation in the country of origin”.²⁶² The provision does not state when examination of the foundedness of an “identical application” is warranted. We should observe that all other variants of the subsequent application require that (further) examination takes place, and that certain conditions are fulfilled. Arguably, we must therefore take the term “identical” literally: only if the subsequent application is based on exactly the same grounds as the previous one, may it be declared “inadmissi-

ble”. If the applicant raises new elements, the application can therefore not be declared “inadmissible”.

[437] What grounds are “new” for the purpose of Article 33(4) PD? Not only new grounds that “arise”, but also new grounds that are “presented by the applicant” after the previous examination merit “further examination” of the application. It is therefore not required that the new facts or circumstances that the applicant presents “arose” after the previous examination. It appears to be sufficient that the applicant presents elements or findings that are “new” in the sense that they were not addressed in the previous examination - quite in accordance with relevant international law (see number [433] above).

The term “raised”, employed in Article 23(4)(h) on (manifestly) unfounded claims, is indeterminate in this respect. A reading in accordance with relevant international law implies that it also concerns newly presented evidence that could have been presented before. The context of Article 33(4) suggests so too. We saw that it follows from Article 33(4) that even if the applicant presents new facts that he could have presented in the previous procedure, his application merits further examination – that is, examination in the ‘normal’ or ‘normal border procedure’. In these procedures, Article 23(4)(h) PD applies. The stipulation of Article 33(4) that these new facts merit further examination would serve no purpose if those new facts may be disregarded under Article 23(4)(h) PD.

[438] Article 33(4) further requires that the new grounds “add significantly to the likelihood” of the applicant’s eligibility. As argued above, any relevant fact or circumstance submitted in the repeated application may, in combination with the previously stated facts and circumstances, substantiate the claim for protection (see number [433]). Excluding facts that are relevant, and thus “add to the likelihood” that the applicant is a refugee, but not significantly so, may result in expulsion contrary to the prohibitions of *refoulement* and is therefore at variance with international law. Arguably, the “significance” requirement may merely exclude grounds that (assessed in combination with facts and circumstances assessed in the previous procedure) are of only “minimal relevance” for the qualification, as after further examination of such evidence, the application would be considered only “manifestly unfounded” (cf. Article 23(4)(a) PD).

Article 23(4)(h) PD does not stipulate that the new facts should “significantly add to the likelihood” of qualification. It follows that the normal burden of proof as established by the Qualification Directive applies.

The new grounds that were submitted in the repeated application should be

assessed in conjunction with facts and circumstances addressed in the previous examination (number [434] above). Indeed, the ‘preliminary procedure’ requires this. This follows from the term “add” in Article 33(4), and from Article 3A(2)(c) PD that requires that the authority responsible for the preliminary examination “has access to the applicant’s file regarding the previous application”. Article 23(4)(h) does not address the matter.

[439] Finally, Article 34(2) states that

“Member States may lay down in national law rules on the preliminary examination pursuant to Article 33. Those rules may *inter alia*:

- (a) oblige the applicant concerned to indicate facts and substantiate evidence which justifies a new procedure;
- (b) require submission of the new information by the applicant concerned within a time limit after which it has been obtained by him or her”.

It appears that Article 33(4)(2)(a) allows Member States to make exception to Article 4(5) QD. According to the latter provision, statements by the applicant need no further evidence if, *inter alia*, the applicant is, in general, credible (see number [283] above). Article 34(2)(a) PD on the other hand allows for national law that obliges the subsequent applicant to “substantiate evidence” that justifies the new procedure. So the benefit of the doubt does not (necessarily) apply to the subsequent applicant. As a result, a higher burden of proof applies to subsequent applications than to first applications. As observed above, such a rule is at variance with international law (number [433]). In this context, we should observe that in the case of *Hilal*, the UK government had argued before the Strasbourg Court that the belated statements of facts by Hilal negatively affected his credibility.²⁶³ The European Court of Human Rights however did not draw this belated statement into consideration when addressing the applicant’s credibility.²⁶⁴ Rather, it applied the usual criterion for assessing whether or not Hilal ran a real risk of being subjected to ill-treatment upon removal.²⁶⁵

As to Article 34(2)(b), we may observe again that the assessment of the applicant’s eligibility for protection from *refoulement* should, according to relevant international law, include all relevant facts. In order to conduct a meaningful assessment of the claim, facts may therefore not be excluded from assessment because they are submitted after the lapse of a time limit.

6.4.4.4 Applications by dependants

[440] Applications by dependants may be dealt with in the ‘preliminary pro-

cedure' (Article 33(7) PD), and turned down as 'inadmissible' (Article 25(2)(g) PD) or 'manifestly unfounded' (Article 23(4)(o) PD) in the other procedures. Article 33(7) PD states that the 'preliminary examination'

"will consist of examining whether there are facts relating to the dependant's situation justifying a separate application".²⁶⁶

The same condition applies to admissibility of applications by dependants.²⁶⁷

Neither Article 33(7) nor Article 25(2)(g) requires that the facts are "new"; they merely must "relate to the dependant's situation". In the case of dependant applicants, the previous examination addressed the application lodged by the partner or parent on their behalf. Arguably, facts that were assessed in this previous examination, but were (apparently) insufficient for substantiating the claim of the parent or partner, could nevertheless qualify as facts that justify a separate application by the dependant. Still, these provisions do not secure compliance with international law as they do not state when such facts "justify" the separate application. Moreover, in cases where the dependant application is processed in the 'preliminary procedure', the applicant may be denied the opportunity of stating in a personal hearing why those facts justify a separate application (see number [402]).

Article 23(4)(o) addresses the minor whose previous application was deemed, according to domestic law, to be part of the application of a parent;²⁶⁸ the minor hence did not "consent".²⁶⁹ If the latter application has been rejected, the "subsequent application" of the minor is (manifestly) unfounded if "no new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin".²⁷⁰ The term "new" distinguishes facts and circumstances not yet assessed in the previous examination. But "elements" addressed in the examination of the application of the parent may warrant of examination of the minor's claim. In order to comply with international law, the Member States should therefore disregard the term "new" in Article 23(4)(o) PD, and include in the assessment all relevant facts concerning the minor's individual circumstances or the general circumstances in the country of origin, relevant for the minor's claim, regardless of whether these facts were also assessed in the examination of the parent's application.

6.4.4.5 Applications after withdrawal

[441] Article 20(2) PD offers the Member States two courses of action in the case that an applicant "reports again" after a decision to discontinue the

examination of his (first) application has been taken (see number [429] above).²⁷¹ First, they can examine the “request” as a subsequent application in the preliminary procedure. Second, if they do not do so, they “shall ensure” that the applicant has the opportunity to request that his case is “re-opened”.

If the request is dealt with in the preliminary procedure, Member States must “further examine” the application if “new facts or findings have arisen that add significantly to the likelihood” of his eligibility for protection²⁷² – the same condition that applies to the repeated application (number [438] above). But applications lodged after “withdrawal” differ from repeated applications in that no previous assessment of facts and circumstances has taken place: the decision in the previous procedure only addressed the applicant’s lack of cooperation (or decision to withdraw). Hence, there are no grounds to consider that facts and circumstances adduced in the previous application do not merit eligibility for protection. The requirement that “new” grounds did arise or are presented therefore lacks justification. In order to comply with their obligations under the prohibitions of *refoulement*, the Member States must “further examine” any facts or circumstances that the applicant submits. Indeed, Article 33(5) explicitly allows Member States to “further examine a subsequent application where there are other reasons according to which a procedure has to be reopened”, “in accordance with national legislation”.

[442] As to the second option, Article 20(2) does not state when the Member States must “re-open” the case, but allows them to “provide for a time-limit after which the applicant’s case can no longer be re-opened”. It appears that after the lapse of this time limit, the application may be dealt with as a repeated application, and hence may be limited to “new” facts or findings. Thus, the facts and circumstances submitted in the previous application may be regarded as if they were assessed and do not merit eligibility for protection. Article 20(2) PD shows awareness of the violation of international law to which this fiction may lead where it states that

“Member States shall ensure that such a person [i.e. a person whose request to re-open the case is turned down] is not removed contrary to the principle of *refoulement*”.

Accordingly, the provision continues as follows:

“Member States may allow the determining authority to take up the examination at the stage where the application was discontinued”.

It follows from the above-said that the Member States should do so in order to comply with their obligations under international law.

6.4.4.6 Concluding remarks

[443] The Procedures Directive does not introduce a common concept for dealing with ‘subsequent applications’. Rather, the same kind of case may be dealt with in different procedures, and different criteria of assessment may apply. For example, ‘repeated applications’ (an application that was lodged after a previous one by the same applicant was decided upon) may be examined in the ‘preliminary procedure’ as subsequent applications, or in another procedure as inadmissible or as (manifestly) unfounded applications, depending on how a Member State’s asylum procedures happen to be organised. In this respect, the Directive hardly establishes approximation of law. As a consequence, the Directive allows for disharmony as to the application of “basic principles and safeguards” to identical types of cases. For if the repeated application is dealt with as grounds for inadmissibility in the ‘examination’ or ‘normal border procedure’, all “basic safeguards and guarantees” in Chapter II apply. But if it is grounds for manifest unfoundedness, no personal interview has to be held. And if the Member State happens to apply the ‘preliminary procedure’, very few safeguards apply. If the “basic principles and safeguards” serve to ensure compliance with relevant international law, there is no justification for this variation in treatment.

[444] International asylum law allows the Member States to require that subsequent applicants state new facts or circumstances. But the requirements may not amount to raising the standard or burden of proof beyond well-founded fear or real risk. Several provisions however (Articles 33(4), 23(4)(o) and 20(2) PD) do suggest standards that, if applied, would raise the standard of proof.

We should further observe that several arrangements concerning subsequent applications seem to serve the purpose of sanctioning belated statement of facts, or lack of co-operation on the side of the applicant. Thus, Article 20 PD allows the Member States to do without examination in case of failure of the applicant to report, and leaves them discretion as to the conditions on the reopening the examination. Further, time limits may block relevant facts from being assessed as to their relevance for qualification for protection (cf. Articles 34(2)(b) and 20(2) PD). Finally, Member States may sanction belated statement of facts by applying a special standard and burden of proof in the preliminary procedure (Articles 33(4) and 34(2)(a) PD). Such arrangements may be desirable for expeditious decision-making, but they exclude from examination facts that are relevant for qualification as a refugee or as a person

entitled to protection from *refoulement*. The obligation to provide for effective protection from *refoulement* requires that these standards not be applied.

6.4.5 The safe country of origin

6.4.5.1 Introduction

The concept

[445] The safe country of origin concept entails that the general situation in a country of origin justifies the presumption that its nationals do not in general qualify as refugees (or as persons in need of subsidiary protection).²⁷³ The safe country of origin concept bears some resemblance to the safe third country concept (to be discussed in Chapter 7). Both concepts entail a presumption that a country is “in general safe” for applicants; in both cases, rebuttal of the presumption may be allowed under certain conditions. However, the two concepts address different questions. The safe third country exception concerns the “safety” of a state other than the country of origin of the applicants. It does not address – and is without prejudice to – the alien’s qualification as a refugee or as a person within the scope of one of the prohibitions of *refoulement*. The assumption that a third country is a “safe third country” for a particular applicant entails that he could (and should) apply for protection there. The safe country of origin exception, on the other hand, does address that qualification. The assumption that a country is a safe country of origin for a particular applicant means that he is not eligible for refugee or subsidiary protection, and hence can be sent back to his country of origin.²⁷⁴

[446] The Procedures Directive lays down rules for two modalities of the safe country of origin concept. First, the designation of third countries (i.e. non-Member States) as safe by the Council. According to Article 30(1) PD, the Council shall draw a “minimum common list” of safe third countries of origin. All Member States must (obligatorily) consider these countries as safe. Applicants from those countries must have an opportunity to try and rebut this presumption of safety under certain conditions (Article 30B(1) PD, see further under number [454]). If the applicant does not manage to do so, the application must (obligatorily) be turned down (Article 30B(2) PD, see further number [459]).

Second, Article 30A PD allows Member States to draw national lists of safe countries of origin (“national designation”). Applicants from those countries

must have an opportunity to try and rebut this presumption of safety under certain conditions (Article 30B(1) PD). The Directive does not impose an obligation to turn down the application if the applicant does not manage to rebut the presumption (see number [461]).

A third modality of the concept is laid down in the Spanish Protocol attached to the Treaty on European Community,²⁷⁵ and designates the Member States as safe countries of origin. This Protocol does not make part of the Common European Asylum System presently under discussion, as it addresses applications by EU nationals. But its rules and the scholarly comment on it are valuable for assessing the safe third country of origin exception and its compatibility with international law, and will therefore be referred to below.

The safe country of origin concept and international law

[447] In order to assess the compatibility of the safe country of origin concept with international law, we should address the way the exception fits into the examination of applications for asylum. For safe country of origin arrangements can function in two ways.²⁷⁶

First, the presumption of safety may function as an obstacle for access to individual examination. Then, the applicant has first to rebut the presumption that his country of origin is safe; if he manages to do so, he still must substantiate his claim. Then, the rebuttal of the presumption of safety entails an extra requirement that heightens the burden of proof resting on applicants who come from safe countries. Application of the safe country of origin concept in this way would collide with international law for two reasons. First, any increase in the burden of proof entails differential treatment of refugees and other applicants from certain countries that would amount to discrimination on the grounds of nationality, prohibited by Article 3 RC, 26 CCPR and 14 ECHR.²⁷⁷ Secondly, if the burden of proof on the applicant is heightened beyond the standard set by Article 1A(2) read in conjunction with 33 RC, or by another prohibition of *refoulement*, expulsion upon rejection on this ground could result in a breach of those prohibitions on *refoulement*.

But in another, second reading, the concept does no more than spell out a consequence of the interplay between general and individual circumstances involved in the assessment of the well-foundedness of the fear (or reality of the risk). As acknowledged in Article 4(3) QD, next to individual circumstances, the general situation in the country of origin may and should be taken into account in the assessment of a claim (cf. number [281]). If the general situation is one of systematic human rights violations, an applicant needs to produce relatively little evidence of his individual circumstances to substanti-

ate his claim. But if the situation in the country of origin is, in general, perfectly satisfactory, the applicant faces a relatively extensive burden of proof. As Hathaway puts it, applicants from such countries “must counter the established perception that their country is one that can be relied upon to afford them meaningful protection”.²⁷⁸

Importantly, the legal sense of this “established perception” is, in itself, not affected by putting it down in writing (instead of relying on it as some generally known fact on a case by case basis), or by labelling it as a “presumption of safety” that should be “rebutted”. If the various modalities of the safe country of origin concept can be read as mere statements of the established perceptions that these countries are generally safe, without affecting the burden of proof resting on applicants from those countries, they do not collide with international law.

[448] Which of these two readings applies to the modalities of the safe country of origin concept in European asylum law? The rationale for the introduction of the concept appears to be expeditious decision making. Applications by persons coming from a safe country of origin may be considered as manifestly unfounded according to Article 29(2) read in conjunction with 23(4)(c) PD, and to Sole Article under (d) of the Spanish Protocol. Pursuant to Article 23(4)(h), applications by such persons may furthermore be “accelerated”. For the same purpose, Member States may do without a personal interview of these applicants.²⁷⁹ All this points in the direction of the first reading.

However, the requirement of “accordance” with the Refugee Convention and other relevant international law ex Article 63(1) TEC, relevant general principles of Community law and the “respect” for Articles 18 and 19 Charter (cf. Preamble recital (8) PD), all call for the second reading, as far as Articles 30 – 30B PD are concerned. The same applies to the Spanish Protocol, in order to avoid collision with Member State obligations under international asylum law.

Below, I will first address the rules on the designation and on application for all three modalities of the safe country of origin concept. Then, their compatibility with international law and (where relevant) with primary Community law will be assessed.

6.4.5.2 The designation

The “common minimum list”

[449] According to Article 30(1) PD,

“[t]he Council shall, acting by a qualified majority on a proposal from the Commission and after consultation with the European Parliament, adopt a minimum common list of third countries that shall be regarded by Member States as safe countries of origin in accordance with Annex II.”

No such list has been adopted.²⁸⁰

It appears from the Preamble that the drawing of the list is informed not only by legal considerations, but by political ones as well:

“[i]n the light of the political importance of the designation of safe countries of origin, in particular in view of the implications of an assessment of the human rights situation in a country of origin and its implications for the policies of the European Union in the field of external relations, the Council should take any decisions on the establishment or amendment of the list, after consultation with the European Parliament”.²⁸¹

The Preamble further states that

“It results from the status of Bulgaria and Romania as candidate countries for the accession to the European Union and the progress made by these countries for membership that they should be regarded as constituting safe countries of origin for the purposes of this Directive until the date of their accession to the European Union”.²⁸²

As yet, this statement is indeed a merely political one. For in the absence of a “common minimum list”, the relevant arrangement cannot apply to these candidate countries; and as “national designation” is not obligatory (see number [461]), Community asylum law as yet contains no rules that require that the Member States treat these candidate countries as safe countries of origin.

[450] Designation of a third country of origin as safe must, according to Article 30(1) PD, be “in accordance with Annex II”. What do the criteria of this Annex entail? A country is safe if there is “generally and consistently no persecution as defined in Article 9” QD, “no torture or inhuman or degrading treatment or punishment”, and “no threat by reason of indiscriminate violence in situations of international or internal armed conflict”, the types of serious harm addressed in Article 15(b) and (c) QD. The absence of persecution or “mistreatment” (apparently a generic term for serious harm as meant in both Article 15(b) and (c) QD) must be shown “on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances”; further,

“[i]n making this assessment, account shall be taken *inter alia* of the extent to which protection is provided against persecution or mistreatment through:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;
- (c) respect of the non-*refoulement* principle according to the Geneva Convention;
- (d) provision for a system of effective remedies against violations of these rights and freedoms”.

We may observe that according to Article 4(3) first clause and (a) QD, assessment of an application

“includes taking into account [...] all relevant facts as they relate to the country of origin at the time of taking the decision on the application; including [...] the relevant laws and regulations of the country and the manner in which they are applied.”

Apparently, Annex II under (b) to (d) address the “relevant facts” other than the country’s “laws and regulations”.

[451] Does the application of these criteria establish a country’s safety in a meaningful kind of way? Annex II implies some formal standards for assessing the safety of the third country. Thus, third countries must have in force “laws and regulations” providing for protection. The requirement that the country “observes” relevant instruments of international law, arguably, implies that it is party to them. We may observe in this respect that the Annex allows for designation of a country as safe if it ratified only the Convention Against Torture – a scope of obligations under international law far narrower than “in particular” the rights meant under Article 15(2) ECHR.²⁸³ The material standards appear, however, to be more important: prevalence of the rule of law and a democratic system are required, as well as protection from persecution or “mistreatment”²⁸⁴ through the manner in which relevant laws are applied, and remedies should be effective. Hence, the Annex states material criteria for the assessment of safety.

Still, the designation of a country as safe by appearance on the common list has limited validity. First, the safety criteria laid down in the Annex only partially address the relevant criteria set out in the Qualification directive. Most conspicuously, it appears that the occurrence of the “death penalty or execu-

tion” (Article 15(a) QD) does not preclude designation as “safe” pursuant to the Annex.²⁸⁵ Designation of a country as safe pursuant to these criteria hence does not establish any meaningful presumption that the country is indeed safe for applicants falling exclusively into that category. Second, it appears from the Preamble to the Procedures Directive (see number [449]) that application of the criteria is connected with the external politics of the Union, and hence, it appears, partially informed by political rather than asylum law considerations. Third, the qualified majority voting means that Member States are obliged to regard states occurring on the list as safe, even though they did not consider them safe themselves.

National designation

[452] A somewhat different regime applies to “national designation” of safe countries of origin. Individual Member States “may” designate as “safe” states that do not occur on the common minimum list, in accordance with Annex II.²⁸⁶ Countries removed from the common list may therefore turn up on national lists. Member States may furthermore designate a part of a third country as safe, if that part fulfils the requirements of Annex II.²⁸⁷ Moreover, they may retain legislation already in force at the time of adoption of the Procedures Directive that designates countries, or parts of countries as safe, or countries or parts of countries as safe for a specified group, in accordance with only some of the relevant requirements.²⁸⁸ It suffices if

- “persons in the third countries concerned are generally²⁸⁹ neither subject to:
- (a) persecution as defined in Article 9 [QD]; nor
 - (b) torture or inhuman or degrading treatment or punishment”.

Hence, neither serious harm as meant in Article 15(c) QD, nor the requirements that the countries provide for protection as meant in Annex II such as ratification of relevant instruments of international law, nor observance of the rule of law or a functioning democratic system are required for such national designation.

The Spanish Protocol

[453] According to the Sole Article of the Spanish Protocol, “Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters”. This presumption of safety is based on “the level of protection of fundamental rights and freedoms by the Member States of the European Union”. What level exactly the masters of the Treaty had in mind is clarified to a certain extent by the circumstances when this assumption of safety is lifted:

- “(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating its territory from its obligations under that Convention;
- (b) if the procedure referred to in Article F.1(1) of the Treaty on European Union has been initiated and until the Council takes a decision in respect thereof;
- (c) if the Council, acting on the basis of Article F.1(1) of the Treaty on European Union, has determined, in respect of the Member State of which the applicant is a national, the existence of a serious and persistent breach by that Member State of principles mentioned in Article F(1) [...]”

Article 7(1) TEU (formerly F.1(1)) provides for “recommendations” to a Member State in case of “a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1)” TEU, that is “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”. These standards are quite similar to those set out in Annex II. The provision under (c) parallels removal of a third country from the common minimum list (see number [454] below), the provision under (b) the suspension arrangement applying during the handling of a request for removal.

So far, the criteria for regarding Member States as safe are pretty similar to those for regarding third countries figuring on the “minimum common list” as safe. But as to the grounds mentioned under (a), the matter is different. The presumption that a particular Member State is safe can be lifted if it avails itself of its competence under Article 15 ECHR: that is, when it derogates from rights and freedoms in the European Convention of Human Rights as far as Article 15 allows for it. That State would still be fully bound to observe the non-derogable rights of Article 15(2) ECHR. But pursuant to Annex II PD, third countries may occur on the minimum common list if they “observe” “in particular” the rights meant in Article 15(2) ECHR: whether or not they observe the other rights and freedoms set out in the European Convention is therefore not particularly relevant. A Member State therefore need not be regarded as a safe country of origin if it derogates from rights derogable under Article 15 ECHR, whereas the same derogation does not preclude designation of a third country as safe. So remarkably, the conditions regarding Member States as safe are stricter in this respect than those applying to third countries.

6.4.5.3 The application

The minimum common list

[454] Appearance on the minimum common list establishes the presumption that the country is “safe” for nationals of that country.²⁹⁰ We saw that this presumption is obligatory: these countries “shall be regarded” as safe (Article 30(1) PD). According to Article 30B(2) PD,

“Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Article 30”.

Thus, rejection of applications by nationals from safe countries of origin is obligatory. This obligation is however subject to two conditions. First, Article 30B(1) states grounds for rebuttal. Second, the obligation is lifted upon request for removal of a country from the common minimum list.

As to the first condition, the rebuttal, Article 30B(1) states that a country figuring on the common minimum list

“can, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if [...; the applicant] has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee in accordance with [the Qualification Directive].”

Article 30B confirms that an “individual examination” of the application is obligatory.²⁹¹ Moreover, it requires that the presumption of safety is lifted in case the applicant submits “*serious* grounds for considering the country not to be safe in his/her particular circumstances” (emphasis added).²⁹²

As to the second condition, the obligation to reject applications as unfounded by virtue of Article 30B(2) may be “suspended”. Suspension may occur in two circumstances. First, it is suspended for all Member States when the Council requests that the Commission submits a proposal for removing a third country from the list.²⁹³ Second, if a Member State requests removal of a country from the list, the obligation to reject applications from nationals of that country as unfounded is suspended for that particular Member State.²⁹⁴ Such suspensions end when the Council rejects a proposal for removal, and when the Commission does not submit a proposal within three months.²⁹⁵

[455] Is it possible to interpret this arrangement as compatible with relevant international law and Community law, the second way the third country exception may function as suggested under number [447]? The appearance of coun-

tries on the minimum common list does not, in itself, affect the procedural position of the applicant. Nor is the position of the applicant adversely affected by the requirement of Article 30B(1), that he should submit “grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee in accordance with” the Qualification Directive. Any applicant should submit grounds for substantiating his request for protection. Thus, both aspects of the arrangement seem in themselves compatible with designation of the safe country of origin as a statement of “general facts and circumstances” on that country.

[456] This leaves three problematic aspects of the arrangement: the standard for rebuttal, the discriminatory aspects of the arrangement and the obligatory nature.

As to the standard for rebuttal of the presumption of safety stated in Article 30B(1) PD, the English and German versions of Article 30B(1) require “serious grounds” and “*schwerwiegende Gründe*”; pursuant to Article 2(e) and 4(1) QD, applicants must show “substantial grounds” for “substantiating” the claim (present “*stichhaltige Gründe*” “*zur Begründung*”). Possibly, only “serious grounds” (“*schwerwiegende Gründe*”) would be sufficient for “substantiating” the claim (would be “*stichhabend*”). But rebuttal of the presumption of safety of the country of origin does not entail qualification: the applicant should after this rebuttal still “substantiate” his claim for refugee or subsidiary protection status. Therefore, *any* standard beyond mere “grounds” for rebuttal of the presumption of safety does, arguably, heighten the burden of proof. However, not all language versions imply this heightened burden of proof. The “*raisons sérieuses*” in the French language version of Article 30B(1) PD seem to state a similar standard as Article 2(e) QD, which speaks of “*motifs sérieux*”.²⁹⁶ As to the Dutch language version, the standard of Article 30B(1) (“*substantiële redenen*”) is, if anything, lower than the one that applies pursuant to Article 2(e) QD (“*zwaarwegende gronden*”).²⁹⁷

Should we assume that Article 30B(1) PD sets a higher, equal or lower standard for rebuttal than the standard of proof in Article 4(1) read in conjunction with 2(e) QD? A heightened standard of proof would adversely affect the position of refugees from safe countries of origin, and hence constitute discrimination. A reading in accordance with international law therefore favours the French language version. Arguably, relying on the French and Dutch language versions, we should disregard the words “serious” and “*schwerwiegend*” in the English and German language versions and assume, that Article 30B(1) PD does not imply a higher standard of proof for nationals

from safe countries of origin than for other nationals, in accordance with international law.

[457] Incidentally, we may note that even if Article 30B(1) PD did raise the standard of proof, application of this standard would not be obligatory. For Article 30B(1) does not *preclude* Member States from application of the normal burden of proof. A reading “in accordance with” the Refugee Convention and other relevant international asylum law would require that Member States disregard this “serious grounds” standard and allow any grounds for lifting the presumption. Allowing for more liberal standards for rebuttal than “serious grounds” would serve the purpose of the provisions, which is, apparently, precluding application of the presumption of safety in an “absolute” manner.²⁹⁸ The context would also endorse this reading. Article 30B(3) explicitly allows, even obliges, Member States to “lay down in national legislation further rules and modalities of the safe third country of origin concept”. Finally, the legal character of the provision strongly supports this reading: according to Article 63(1)(d) TEC, the provision can merely set a minimum standard, and hence should allow Member States to apply more beneficiary standards (see further number [459] on the minimum standard character of the provision).²⁹⁹ Thus, Member States could disregard the “serious grounds” requirement, in order to avoid violation of international asylum law and hence primary Community law.

[458] The second problematic feature of the safe third country of origin arrangement is that a disadvantageous procedural position of nationals from countries occurring on the common minimum list may amount to discrimination. Designation of applications of such nationals as manifestly unfounded pursuant to Article 29(2) read in conjunction with 23(4)(c) PD does not in itself adversely affect their procedural position, as the Directive does not attach legal consequences to manifest unfoundedness. Nor does accelerated examination of their applications, as any application may be dealt with in an accelerated procedure. But according to Article 10(2)(c) PD read in conjunction with 23(4)(c) PD, Member States may omit the personal interview because the applicant comes from a safe third country. Omitting the personal interview would seriously affect the applicant’s opportunities to rebut the presumption of safety of his country of origin and hence, to substantiate his claim for protection. In order to avoid discrimination on the ground of nationality, Member States therefore should not omit the personal interview on these grounds.

[459] The third problematic feature is the obligatory nature that could be at

variance with the minimum standard character of the arrangement. The modalities of the safe country of origin exception laid down in the Procedures Directive should, pursuant to Article 63(1) and (2) TEC, lay down minimum standards. If the safe third country of origin arrangements required Member States to issue negative decisions at variance with their obligations under international law, they would not set minimum standards and on those grounds be at variance with Article 63 TEC (cf. number [217] above).

We saw that the Member States must regard the countries that occur on the minimum common list as “safe”, and that they must reject an application as unfounded if the applicant from such a country does not manage to rebut the presumption of safety (Articles 30(1) and 30B(2) read in conjunction with 1 PD). Article 30B(1) PD allows as we saw for any standard of rebuttal. In this, the arrangement would therefore seem to set, in effect, a minimum standard, despite the obligatory wording of Article 30B(2) PD.

We should, however, observe that application of the presumption that a country is safe can be in conformity with Article 1A(2) read in conjunction with 33 RC (and with the other prohibitions of *refoulement*) only as long as the situation in the country warrants it. In the case of group persecution in a country, there is no place for the assumption that persons from that country should rebut the perception that it is safe. Article 4(3)(a) QD quite correctly requires assessment of the situation in the country of origin “at the time of taking a decision on the application”. But the rules on removal of countries from the common minimum list hardly allow for quick response. True, the obligation to reject applications by nationals from a state on the common list is suspended when Member States request removal of that state from the list. If a country is not safe any more, a Member State is obliged, pursuant to its obligations under international law, to request removal of that state from the list upon an application by a national from that state. Still, the value of this suspension arrangement as a safety valve is limited. A negative Council decision to the request terminates the suspension, upon which the obligation to reject revives. The relevant rules do not explicitly prohibit a Member State from submitting a subsequent request on the same grounds. As these rules set minimum standards, we should assume that they allow for such subsequent requests for removal from the list.

Arguably, then, it is possible to construe Article 30 read in conjunction with 30B PD as a minimum standard. Article 30B allows Member States to apply a more beneficiary standard of proof to applicants from safe countries of origin than the standard suggested in Article 30B(1). The possibility of suspending application of the minimum common list by requesting removal of a

country is a device that secures their competence to deviate from the arrangement to the benefit of third country nationals. Still, one could argue that leaving the Member States a possibility to suspend the working of provision that explicitly prevents them setting more favourable domestic standards is not the same as allowing them to “introduce or maintain more favourable provisions for third country nationals [...] who ask for protection”,³⁰⁰ and hence not a minimum standard.

[460] In summary, it follows from a comparison of several language versions and a reading in accordance with relevant international law that the standard for rebuttal of the safety of the state on the common minimum list stated in Article 30B(1) PD is not higher than the standard of proof that applies to any other applicant pursuant to Articles 2(e) and 4(1) QD. Still, the safe third country concept ex Article 30 read in conjunction with 30B PD shows two major flaws. First, Articles 30 – 30B read in conjunction with 23(4)(c) read in conjunction with 10(2)(c) allow for omitting the personal interview merely on the grounds that the applicant comes from a country figuring on the common minimum list. As omitting the interview on these grounds would amount to discrimination on the grounds of nationality, Member States may not make use of the competence.

Second, the obligatory application of the presumption of safety is in line with international law only as long as the country is indeed safe (that is, as long as the situation in that country justifies the perception that it can offer its nationals protection). Individual Member States that regard a particular country on the list as unsafe can evade application of the concept only by lodging (continuous) requests for removal of that country from the common minimum list. Hence, the arrangement does offer a possibility to set more favourable domestic standards. Still, one may feel that offering a sort of escape route is not the same as allowing Member States to maintain or introduce more favourable national legislation.

National designation

[461] The Procedures Directive does not require that Member States reject as unfounded applications by nationals of countries designated as safe in national legislation,³⁰¹ instead leaving the matter to domestic legislation.³⁰² It only states that the presumption must be open to rebuttal on the same conditions that apply to the countries figuring on the “common minimum list”.³⁰³ The Procedures Directive’s rules on national designation of safe third countries of origin are therefore true minimum standards, and the competence of Member

States to lay down in national legislation further rules for the application of the concept allows them to ensure performance under their obligations under international law. But we may observe that the Procedures Directive does not secure that such domestic application of the concept is in conformity with relevant international law standards.

Article 10(2)(c) read in conjunction with 23(4)(c) read in conjunction with 30A PD allow Member States to waive the personal interview of nationals from countries designated as safe under national law. As argued above, this would amount to discrimination on the ground of nationality; the competence to waive the interview on this ground may therefore not be made use of.

The Spanish Protocol

[462] The Spanish Protocol obliges Member States to regard each other as safe countries of origin, unless the presumption is lifted pursuant to one of the grounds discussed above (number [453]). If none of these grounds apply, a state may nevertheless take an application by a Member State national into consideration

“(d) if a Member State should so decide unilaterally in respect of the application of a national of another member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.”

Thus, the processing of applications of nationals of other Member States is subject to two conditions. First, the Member State must “immediately” inform the Council (to what effect is unclear, as the Council is not attributed any competence in this matter). Second, the Member State must presume that the application is manifestly unfounded. As Noll observes, this requirement is in utter contradiction with the stipulation that the “decision-making power of the Member States” remains unaffected; he observes that in a reading in conformity with relevant rules of international law, the Member States are obliged to “decide” that the application will be examined.³⁰⁴

Thus, the Spanish Protocol does not block access to examination procedures. Still, it affects the position of any EU applicant by requiring that applications by EU nationals are dealt with “on the basis of the presumption that it is manifestly unfounded” – which implies differential treatment. Noll holds that this amounts to discrimination, on the assumption that the position of EU nationals is adversely affected by the requirement that their applications are regarded as “manifestly unfounded”.³⁰⁵ However, neither the Spanish Protocol

nor any other Treaty provision attaches any legal consequences to the labelling as “manifestly unfounded”. We cannot, therefore, state that this labelling in itself adversely affects the legal position of applicants from the Member States. It is possible and, in the light of relevant treaty obligations, required to read the Sole Article of the Protocol as stating as “relevant generally known facts” that the Member States do in general not indulge in persecutory behaviour.

6.4.5.4 Concluding remarks

[463] International asylum law allows for application of safe country of origin arrangements on two conditions. First, the general situation in such countries should warrant the “perception” or presumption that meaningful protection from persecution or harm is available there. Second, conditions on the countering of this perception (or rebuttal of this presumption) may not result in a burden or standard of proof differing from those applicable to applicants from other countries, for differential treatment on grounds of nationality would amount to discrimination prohibited by Articles 3 RC, 26 CCPR and 14 read in conjunction with 3 ECHR. Moreover, imposition of a burden or standard of proof raised beyond the level set by the prohibitions of *refoulement* would amount to breach of those prohibitions.

As to the first issue, Annex II to the Directive proposes relevant criteria, which could establish a country’s safety in a meaningful kind of way. But appearance on the list can do so only to a limited extent. Most importantly, it follows from the Preamble that the drawing of the list may be informed by political considerations, and individual Member States that are not convinced that a particular country is safe may be overruled, as the Council adopts the list by qualified majority.

Only part of the standards set out in Annex II must be applied to the national designation of safe third countries of origin. As far as such national designation may deviate from these standards, the validity of the presumption is adversely affected.

The Member States must regard countries appearing on the common minimum list as safe; applications by their nationals must be rejected, unless these nationals manage to rebut the presumption. This obligation collides with international law where the grounds for regarding the country as safe do not apply (any more). But Member States may lift the presumption of safety by requesting removal of the country concerned from the common list. International asylum law requires that Member States make use of this competence where necessary.

As to the second issue, in one instance the Procedures Directive proposes differential treatment. Article 10(2)(c) PD states that Member States need not offer nationals from safe third countries of origin the opportunity of a personal interview. Such omission would affect the possibility of substantiating their claim to protection. Therefore, Member States may not omit the interview on this ground.

The Spanish Protocol allows Member States to process applications by nationals of other Member States. International law obliges them to make use of this competence. Applications by EU nationals must be treated as if they were manifestly unfounded. As the instrument does not attach any particular legal consequence to such designation, this obligation is, as such, not discriminatory.

[464] Hence, the Procedures Directive suggests rules whose application would give rise to discrimination or even breach of the prohibitions of *refoulement*. Furthermore, it requires rejection of claims by nationals from states that figure on the minimum common list, who do not manage to rebut the presumption of safety. It is hard to see how this obligation to issue a negative decision on an application could serve the purpose set out in Article 1 PD, of establishing *minimum* standards on procedures. Although application in a way compatible with international asylum law appears to be possible, it is not self-evident that they set minimum standards.

6.4.6 Concluding remarks

[465] Before summarising the findings on the grounds for refusal, one final question must be addressed: does European asylum law impose an order of application of these grounds? The 1992 London Resolution concerning Host Third Countries did so. This instrument implied that Member States should first consider expulsion to a non-Member State in accordance with the exception of the safe third country; if not applicable, responsibility of another Member State should be addressed and only finally whether the application is well founded.³⁰⁶ A similar order however does not prevail under European asylum law. Article 4(1) of the Dublin Regulation states that the “process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State”, which implies that Member States should first consider application of the Dublin Regulation. But this provision is without prejudice to the “right” of Member

States to send applicants to safe third countries.³⁰⁷ And there is no reason to assume that a Member State violates the Dublin Regulation when it examines the merits of a claim without previous determination of responsibility: pursuant to Article 3(3) DR, it may examine any application for asylum lodged with it. Under the Procedures Directive, the exception of the safe third country may be a ground for declaring a claim “manifestly unfounded”, which implies admissibility of, and responsibility for that claim. According to Article 25(2)(a) PD, the claim of an applicant whose refugee status has previously been recognised by another Member State can be declared inadmissible, but the same circumstances could serve to establish responsibility of another Member State under the Dublin Regulation.³⁰⁸ Determining responsibility apparently does not necessarily precede examination of admissibility ex Article 25(2) PD. In summary, European asylum law neither explicitly imposes nor tacitly implies there is an order of application of the various grounds for refusal.

A number of grounds for refusal discussed in this paragraph raise questions as to their compatibility with international asylum law or other European legislation. Inadmissibility on the ground that the applicant enjoys “a status equivalent to the rights and benefits of the refugee status by virtue of [the Qualification Directive]” (Article 25(2)(d) PD) may entail denial of Refugee Convention benefits that are not laid down in that Directive, and of the benefits applying to recognised refugees by virtue of the Family Reunification Directive. Declaring a claim (manifestly) unfounded because a person “is a danger to the national security or the public order of the Member State” (Article 23(4)(m) PD) entails denial of the benefits of Article 14(6) QD.

The Procedures Directive contains several arrangements according to which “subsequent applications” (which may be applications by dependants, or repeated applications) can be dismissed in the case that no “new” grounds are stated. It follows from a contextual reading that for the purposes of Articles 33(4) and 25(2)(f) PD, grounds that could have been stated in the previous procedure must be addressed in the subsequent one. Article 34(2) and 33(4) imply, however, raised standards of proof for subsequent applications, at variance with international law.

Finally, and most remarkably, the obligatory dismissal of an application by a claimant, if he comes from a safe third country of origin that figures on the “minimum common list”, and if he cannot rebut this presumption of safety (Articles 30 read in conjunction with 30B PD). This arrangement may be read as a device that merely formalises the perception that a country is *prima facie* safe, in accordance with relevant international law. Member States may sus-

pend this obligation by requesting that a state should be removed from the list. Although the arrangement can be read as allowing member States to set more favourable domestic standards, its minimum standard character is an object of doubt. Finally, denial of the opportunity to a personal interview to persons from such safe countries would amount to differential treatment, which would be at variance with international law.

6.5 Termination procedures

In this paragraph, I discuss the procedural rules on the termination of refugee status (par. 6.5.2) and of temporary protection status (par. 6.5.3). European asylum law does not state procedural rules on withdrawal of subsidiary protection status (cf. number [472]).

Procedures on the termination of protection statuses may be subject to the rules of international and of Community law on asylum procedures discussed in the paragraphs 6.2.1 and 6.3.1. If the decision to terminate the status amounts to a decision to expel the alien, the prohibitions of *refoulement* may be engaged. As far as the protection status implies rights protected by Community law, relevant general principles of Community law apply. Further, two provisions of international law more specifically address the termination of the protection status: Articles 32 RC and 13 CCPR (discussed in paragraph 6.5.1).

6.5.1 International law

[466] According to Article 32 RC,

- “1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall only be in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. [...]”

As will be argued under number [562], this provision applies only to recognised refugees; applicants and temporary protection beneficiaries therefore fall out of its scope. It applies to refugees who are “lawfully in the territory”

of the Member States. A reasonable interpretation leads to application of this Article to withdrawal of a refugee's residence permit: withdrawal of the permit ends the lawfulness of the sojourn.³⁰⁹

The second paragraph lists some procedural requirements. First, the decision to expel must be reached "in accordance with due process of law".³¹⁰ Secondly, "the refugee shall be allowed to submit evidence to clear himself" and thirdly he has the right to appeal to a "competent authority".

[467] Article 13 CCPR runs as follows:

"An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

The provision guarantees several safeguards in expulsion cases for "lawfully present" aliens. The term "lawful" implies that the alien's presence is in conformity with relevant domestic law.³¹¹ According to the Human Rights Committee, the protection of the provision extends to decisions "leading to expulsion", such as the assessment of the risk of ill treatment upon removal.³¹²

The provision accords two safeguards. First, the decision to expel must be reached in accordance with the law. Second, the lawfully present alien is entitled to review of the decision by an "authority". According to the Human Rights Committee, the provision also sets a material standard to the review proceedings: the remedy must be "effective".³¹³ The remedy does not have to be appeal to the judiciary – review by the authority that took the decision to expel would satisfy the provision.³¹⁴ It seems that the provision does not require that the review proceedings suspend the expulsion.³¹⁵

6.5.2 Termination of refugee status

[468] Chapters IV and V of the Procedures Directive (Article 36, 37 and 38) state rules on the termination of refugee status. Refugee status may end in two ways. First, it may be withdrawn in withdrawal procedures; the Member States must obligatorily provide for this procedure.³¹⁶ Second, Member States "may" (not must) decide that refugee status lapses by law in case of cessation; the rules for withdrawal procedures then do not apply.³¹⁷

Withdrawal means

“the decision by a competent authority to revoke, end or refuse to renew the refugee status of a person in accordance with [the Qualification Directive]”.³¹⁸

Withdrawal can take place on the grounds mentioned in Article 14 QD,³¹⁹ discussed in paragraph 5.6.2 – roughly, cessation or exclusion pursuant to Article 1C, 1D, 1E or 1F RC, applicability of Article 33(2) RC,³²⁰ or if fraud on the side of the applicant was decisive for granting the status. Examination of withdrawal may be started only when “new elements or findings arise indicating that there are reasons to reconsider the validity” of the refugee status.³²¹ Hence, elements or findings known *before* the status was granted can not give rise to withdrawal.

Cessation by law may take place only on the grounds mentioned in Article 11(a), (b), (c) and (d) QD,³²² that is, grounds equivalent to Article 1C(1)(a)-(d) RC: roughly, where some personal conduct of the refugee indicates that he has regained protection from or in the country of origin, or protection from a new country of nationality (see number [346]). Change of circumstances in the country of origin (or former habitual residence) as meant in Article 1C(5) and (6) RC, and Article 11(1) (e) and (f) QD can hence not lead to lapse of refugee status by law, but only to termination after “withdrawal”.

[469] A “competent authority” does the examination in withdrawal proceedings.³²³ This competent authority must be able to obtain “precise and up to date information from various sources, such as [...UNHCR], as to the general situation in the country of origin of the persons [sic] concerned.” The Procedures Directive states no rules for the organisation of this examination.³²⁴

The basic principles and guarantees listed in Chapter II PD do not apply, as they address “applications”. Therefore, the material standard for examination of applications, that the examination should be “appropriate”, and conducted “objectively and impartially” (cf. number [390] above), does not apply, but it follows from Article 36 that the examination should be conducted “individually”.³²⁵ Further, Article 37 PD states a number of guarantees that apply to withdrawal examination, partially by reference to Chapter II. When the competent authority considers withdrawal, the person concerned must be informed thereof, and of the reasons, and

“be given the opportunity to submit, in a personal interview in accordance with Article 9(1)(b) and Articles 10 to 12 or in a written statement, reasons as to why his/her refugee status should not be withdrawn”.³²⁶

A personal interview is not required. The competent authority should take care

not to disclose information to the persecutors of the alien.³²⁷ The decision to withdraw must be in writing, and be motivated. Upon this decision, the person concerned is entitled to free legal assistance pursuant to Article 13(2) PD, access of the counsellor and of UNHCR must be secured in accordance with Article 14(1) and 21 PD.³²⁸

[470] Article 38(1)(e) provides for the right to appeal from “a decision for the withdrawal of refugee status pursuant to Article 37”. Article 38 does not further address appeal against withdrawal decisions: Articles 38(2) (6) address appeal by applicants only. Lapse of refugee status by law pursuant to Article 37(4) does not take a “decision”, and is therefore not covered by the provision. Lapse by law may require an implementing decision – repeal of the residence permit, for example, but such a decision is not a decision “pursuant to Article 37”. As the implementation of such cessation affects rights protected under Community law (the right to refugee status ex Article 13 QD, and the attached secondary rights), the Member States must afford an effective remedy pursuant to general principles of Community law.

The safeguards on termination of refugee status address most issues mentioned in Articles 32 RC and 13 CCPR: the refugee has the opportunity to submit evidence to clear himself, the right to appeal and to legal representation. The effectiveness of the opportunity to rebuttal is however affected by absence of a personal interview.

6.5.3 Termination of temporary protection

[471] Temporary protection can end in two ways. First, by law, that is upon the lapse of the Council decision installing it.³²⁹ The possibility of appeal against this decision will be discussed in Chapter 9 (number [634]). Second, a person may be “excluded” from temporary protection.³³⁰ Article 29 TPD states one procedural rule on the matter: the excluded person is “entitled to mount a legal challenge in the Member State concerned”. The term “legal challenge” implies that administrative proceedings might; the words “within the Member State” imply that those proceedings are to have suspensive effect.

6.5.4 Concluding remarks

[472] The CEAS rules on termination of refugee and of temporary protection

status do not raise particular questions as to their compatibility with international law, if only because the arrangements are most succinct. In this context, we should observe that procedures on termination of subsidiary protection status are not addressed in the Procedures Directive.³³¹ The decision to withdraw this status is, however, subject to relevant general principles of Community law that require the possibility appeal (cf. number [417]).

6.6 Assessment

[473] When assessing the rules on procedures that are stated, we must bear in mind that they aim to establish only a “minimum framework”.³³² Meanwhile, the relevant legislation is intended to produce approximation of law on the matter, to provide a first step towards *common* asylum procedures, and to set standards for procedures that should be both “efficient” and “fair”.³³³ These rules should further be in accordance with relevant international law.

European asylum law does indeed provide a number of provisions that do secure to a certain extent the aim of introducing “a minimum framework in the European Community on procedures for granting and withdrawing refugee status”.³³⁴ Articles 3(1) DR read in conjunction with 23(1) and 29(1) PD establish the right to an individual examination of the foundedness of the application in terms of the Qualification Directive. Furthermore, the Procedures Directive and the Dublin Regulation require observance of some important safeguards on procedures at first instance and on appeal procedures. Applicants should receive the services of an interpreter, they must, in principle, have the opportunity of a personal interview, and moreover an “effective remedy” before a court or tribunal from any decision must be provided for.

However, the rules on procedures secure observance of norms of international law only to a limited extent. The most obvious gap in protection is the absence of rules on procedures on the termination of subsidiary protection status, as well as on the granting of this status in some of the Member States. The granting and termination of temporary protection status is addressed only very scantily. Further, crucial issues such as time limits for decision making and other aspects of the procedures at first instance, as well as the suspensive effect of appeal and the scope of judicial review are not addressed. In several respects, the Procedures Directive appears to confirm divergences in state practice, rather than establishing even a “minimum framework” for the processing of claims. Thus, it allows for no less than three “border procedures”.

The same grounds for refusal serve to declare the application inadmissible, unfounded, manifestly unfounded or be addressed in the context of some special procedure.

[474] In itself, the level of harmonisation aimed at or attained is not relevant for the purposes of the present study. But incongruities in the legislation do affect the legal position of protection seekers, as different safeguards apply to the various procedures. The Procedures Directive suffers not only from a lack of conceptual coherence as to the organisation of procedures, it also lacks a coherent view on the question of which safeguards are required to perform an examination of a request for asylum in accordance with relevant standards of international law. If the safeguards of Article 9(1) PD must apply to the preliminary procedure (Article 34(1) PD), why do paragraphs (c) and (d) not apply to the ‘special border procedure’ (Article 35(3) PD)? If all “relevant facts” should be taken into account when assessing the ‘subsequent’ application by a dependant in a ‘preliminary procedure’ (Article 33 PD), why can the same request be dismissed as unfounded if no “new facts” were stated (Article 23(4)(o) PD)?

Such incongruities cannot be justified from the point of view of international law. And the result may be that Member States are tempted to adapt their domestic legislation to the lowest standards that the Procedures Directive offers – quite contrary to the instrument’s objective of safeguarding the rights of the protection seeker.

NOTES

- ¹ *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status of 20 September 2000*, COM(2000) 578 final, OJ [2001] C62E, p. 231 (hereafter referred to as: PD Proposal).
- ² See on this legislative history Ackers 2005.
- ³ *Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status of 18 June 2002*, COM(2002)326final (hereafter referred to as: Amended PD Proposal).
- ⁴ *Initiative of Austria with a view to adopting a Council Regulation establishing the criteria for determining the States which qualify as safe third States for the purpose of taking the responsibility for examining an application for asylum lodged in a Member State by a third country national and drawing up a list of European safe third States*, OJ [2003] C17/6.
- ⁵ Article 3(1) PD.
- ⁶ But this separate procedure for subsidiary protection is nevertheless subject to procedural rules of Community law – see paragraph 9.1.3.
- ⁷ For example Articles 1 (the definition of the directive’s purpose), 23(4)(a), (b) and (g) (on manifestly unfounded applications), and 30B(1) PD (on the application of the safe third country of origin exception).
- ⁸ Annex II under b, and cf. Article 27(1)(c) and (2)(c) PD, see numbers [450], [523] and [527].
- ⁹ Articles 19(2) and 20(1)(e) DR, see number [425].
- ¹⁰ Article 3A(2)(a) PD confirms this, as it explicitly addresses the processing of cases where transfer of the applicant to another Member State according to the Dublin Regulation rules is considered.
- ¹¹ Preamble recital (29) PD.
- ¹² Article 2(e) DR.
- ¹³ We may further observe that the “procedures for determining the Member State responsible” under the Dublin Regulation are primarily an inter-state affair: the Member State where the application was lodged requests the state it deems responsible on the basis of one or more “criteria” to take charge of (or to take back) the applicant (see paragraphs 7.2.1 and 7.3). But the decision not to examine (examination in the second sense) is taken *after* the responsibility has been determined.
- ¹⁴ Article 35(5) PD, see number [381] below.
- ¹⁵ Boeles 1997, pp. 66-70 with further references; Goodwin-Gill 1998, p. 240.
- ¹⁶ ICJ 27 June 2001 (*LaGrand/Germany v. United States of America*), <http://www.icj-cij.org/icjwww/idecisions.htm>.
- ¹⁷ 596 UNTS 261.
- ¹⁸ *LaGrand*, pars. 89-91.

- ¹⁹ ECtHR (Grand Chamber) 4 February 2005, Appl. No. 46827/99 and 46951/99 (*Mamatkulov II*), par. 123.
- ²⁰ Legomsky 2003, III.A.5, pp. 73-4.
- ²¹ Appeals Court The Hague 31 October 2002, *RV 2002, 22 (VAJN And NJCM v. The Netherlands)*, par. 5.2. The statement that Article 33 RC prohibits procedures allowing a “disproportionate risk” to *refoulement* seems to imply that it allows a “proportionate” risk. According to Vermeulen in his comment on the judgement, there is no sound basis for this “disproportionate risk” standard; rather, we should consider it as “a slip of the pen” of the District Court (Vermeulen 2002, p. 136).
- ²² UNHCR Handbook, par. 190.
- ²³ UNHCR Handbook, par. 192.
- ²⁴ ExCom Conclusion No. 8 (XXVIII) of 12 October 1977.
- ²⁵ Boeles 1997, p. 173.
- ²⁶ ECtHR 30 October 1991, Ser. A vol. 215, (*Vilvarajah*), par. 108.
- ²⁷ ECtHR 11 July 2000, *Rep. 2000-VIII (Jabari)*, pars. 39-40.
- ²⁸ *Jabari*, par. 40.
- ²⁹ ECtHR 19 February 1998, *Rep. 1998-I (Bahaddar v. the Netherlands)*.
- ³⁰ Article 35(1) ECHR.
- ³¹ *Bahaddar*, par. 45.
- ³² *Bahaddar*, par. 48.
- ³³ Spijkerboer 2001, pp. 68-69.
- ³⁴ Strictly speaking, the second obligation follows from relevant Chapter II provisions, which Article 23(1) merely confirms (see number [388] below).
- ³⁵ This follows not only from the system of the Procedures Directive as discussed below in the main text, but also from Preamble recital (22) and (13) PD, which state that “*Member States should examine all applications on the substance, i.e. assess whether the applicant in question qualifies as a refugee in accordance with Council Directive 2004/83/EC [...], except where this Directive provides otherwise*”, and that “[...] *every applicant should, subject to certain exceptions, have [...] sufficient procedural guarantees to pursue his/her case at and throughout all stages of the procedure*” [emphasis added, HB].
- ³⁶ The term “moreover” seems to refer to the “prioritised” or “accelerated” processing of claims, referred to in Article 23(3) and (4) PD. As the Directive sets no specific rules for “accelerated” processing (see number [376]), it does not constitute a separate procedure for the purposes of the Procedures Directive.
- ³⁷ Strictly speaking, the derogation concerns the obligations laid down in Chapter II as confirmed by Article 23(1) PD (cf. number [388] below).
- ³⁸ One may feel that in the absence of an individual examination, the arrangement provided for in Article 35A is not a ‘procedure’. But as pursuant to Article 1 the Procedures Directive, and hence Article 35A, serves the purpose of establishing “standards on proce-

dures”, and as moreover the arrangement requires a decision at first instance, and provides for appeal from it, the arrangement can best be labelled as a “procedure”. Furthermore, it may seem that the exception to the obligation to perform an “examination” in Article 35A PD runs counter to the obligation to “examine” the claim in Article 3(1) DR. However, for the purposes of the Dublin Regulation, “examination” encompasses (as far as is relevant for present purposes) “*any [...] decision [...] concerning an application for asylum by the competent authorities in accordance with national law [...]*” (Article 2(e) DR, cf. number [363]), and the Article 35A procedure does provide for such a “decision” (cf. number [384] below). The term “examination” thus has a broader scope in the Dublin Regulation than in the Procedures Directive (that does not define it). In the present Chapter, “examination” refers to the term as applied in the Procedures Directive.

³⁹ Article 19(2) and 20(1) DR; cf. Article 25(1) PD.

⁴⁰ Article 25(1) PD.

⁴¹ Article 29(1) PD.

⁴² Articles 33-34 PD.

⁴³ Article 35A PD.

⁴⁴ Preamble recital (11) PD.

⁴⁵ Article 23(1): “*Member States shall process [...]*”.

⁴⁶ Article 23(3) and (4) PD.

⁴⁷ Article 23(2) PD.

⁴⁸ Article 11(2) RSD : “*If a decision at first instance has not been taken within one year of the presentation of an application for asylum [...]*”.

⁴⁹ Preamble recital (11) PD states that “[*I*]t is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum is left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive”.

⁵⁰ Article 23(1), (3) and (4) PD.

⁵¹ Cf. Article 3A(1) PD.

⁵² Cf. Articles 3A(1) and 7(2) PD.

⁵³ Article 7(2)(c) PD; cf. UNHCR Handbook, par. 192.

⁵⁴ Article 3A(2)(a) PD.

⁵⁵ Article 3A(2)(b) PD.

⁵⁶ Article 9A(1) PD. According to Article 9A(2) PD, the Member States may in particular impose the obligation to report to or appear before the authorities at a specified time, to hand over documents, to inform the authorities of their place of living, and they may provide that competent authorities search the applicant, take a photograph and record oral statements.

⁵⁷ Article 10(1) PD.

- ⁵⁸ Article 10(2)(b), see further number [399].
- ⁵⁹ Article 25 PD.
- ⁶⁰ Article 29 PD.
- ⁶¹ Article 19 read in conjunction with 20 PD. The “decision to reject” in the latter provision is for all practical purposes identical to the decision to discontinue examination – see numbers [429] and [441].
- ⁶² Articles 13 and 18 QD require that refugee or subsidiary protection status is accorded to the person who qualifies for it. Read in conjunction with these provisions, Article 29(1) PD presupposes that the category “founded” does exist.
- ⁶³ Article 25(2)(c) PD.
- ⁶⁴ Article 23(4)(c) PD.
- ⁶⁵ Article 29(2) PD.
- ⁶⁶ The question of whether or not the CEAS implies an order of application of the various grounds for refusal will be addressed in paragraph 6.4.7.
- ⁶⁷ Articles 33 and 33A PD.
- ⁶⁸ Article 33(2)(a) PD; see on the withdrawal of applications number [441] and further.
- ⁶⁹ Article 2(d) PD.
- ⁷⁰ Article 33(2)(b) PD.
- ⁷¹ Article 33(7) PD.
- ⁷² Article 33A PD.
- ⁷³ Article 4(1) QD, see number [279].
- ⁷⁴ Cf. Article 9A(2)(a) PD.
- ⁷⁵ Article 33(4) and 33(7) read in conjunction with 33(4) PD.
- ⁷⁶ Article 3A(2)(c) PD.
- ⁷⁷ Article 35(1) PD.
- ⁷⁸ Article 35(5) PD; see further number [382].
- ⁷⁹ Article 35(1) PD.
- ⁸⁰ Article 3A(2)(c) PD.
- ⁸¹ Article 35(2) PD.
- ⁸² Cf. Preamble recital (16) PD: “*Border procedures should mainly apply to those applicants who do not meet the conditions for entry into the territory of the Member States*”.
- ⁸³ Member States may only maintain this second type of procedures “*in accordance with the laws or regulations in force at the time of the adoption of this Directive,*” and only “[w]hen procedures as set out in paragraph 1 [the normal border procedures] do not exist” (Article 35(2) PD); cf. par. 9.2.3.
- ⁸⁴ Article 3A(2)(e) PD.
- ⁸⁵ Article 35(4) PD. A subsequent “preliminary examination”, surrounded with less safeguards than this border procedure, would be highly unlikely.
- ⁸⁶ Article 35(5) PD.

- ⁸⁷ Cf. Article 35(3) last clause PD: “*in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why his/her application for asylum is considered as unfounded or as inadmissible*”. Though not explicitly mentioned, we may assume that the refusal may also concern a decision to “discontinue examination” or to “reject” the application case of explicit or implicit withdrawal pursuant to Articles 19 or 20 PD, cf. number [429].
- ⁸⁸ Cf. Article 35(4) PD.
- ⁸⁹ Article 3(1) PD: “*This Directive shall apply to all applications for asylum made in the territory, including at the border, or in the transit zones of the Member States and to the withdrawal of refugee status*” (emphasis added). It also follows from Article 35(2) and (4), on permission to enter, that persons in transit zones did not “enter” the “territory” of the Member States.
- ⁹⁰ Article 3A(2)(f) PD.
- ⁹¹ Article 35A(4) and 38(1)(a)(iii) PD.
- ⁹² Article 35A(6) PD.
- ⁹³ Article 24(2) PD.
- ⁹⁴ Cf. Articles 6 and 10, and further 7(2), 8 (according to its heading), 9(1)(d)(e), 11, 12 and 13(2) PD.
- ⁹⁵ Cf. Articles 9(1)(b), 9A PD.
- ⁹⁶ Cf. Articles 5(5), 9(1)(a) PD.
- ⁹⁷ Cf. Articles 5, 7(1), 13(1) and (3), 14 PD.
- ⁹⁸ The deleted part of Article 2(e) PD says “subject to Annex I”. This Annex specifies the definition for Ireland.
- ⁹⁹ Article 35(3) stipulates that the basic guarantees laid down in Articles 6 (on expulsion) and 10 (the right to a personal hearing) apply to ‘special border procedures’. Articles 6 and 10 PD both explicitly address decision-making by the “determining authority”, and in the ‘normal border procedures’, “another authority” than this “determining authority” may take decisions (Article 35(1) PD).
- ¹⁰⁰ Cf. Article 33(1): “*A Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework* [emphasis added, HB]”. It follows that appeal authorities are “competent authorities”.
- ¹⁰¹ UNHCR Handbook par. 192 under iii: “*There should be a clearly identified authority - wherever possible a single central authority - with responsibility for examining requests for refugee status and taking a decision in the first instance*”.
- ¹⁰² Cf. Joint Position, par. 4.
- ¹⁰³ For the purposes of determining the Member State responsible under the Dublin

Regulation, the application is “deemed to have been lodged” once a form or report reaches the competent authorities (Article 4(2) DR).

¹⁰⁴ UNHCR Handbook, par. 192 under i: “The *competent official* (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority”.

¹⁰⁵ Article 6(2) PD.

¹⁰⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ* [2002] L 190/1, Article 2.

¹⁰⁷ According to Article 89(1) of the Rome Statute of the International Criminal Court (Rome, July 17th 1998, 2187 UNTS 3), Article 29(2)(e) of the Statute of the International Tribunal for the Former Yugoslavia (adopted 25 May 1993 by UNSC Resolution S/RES/827 (1993)) and Article 28(2)(e) of the Statute of the International Tribunal for Rwanda (adopted 8 November 1994 by UNSC Resolution S/RES/955 (1994)), persons are “surrendered” to those courts, hence fall within their “jurisdictions”. But there is no reason to assume that this jurisdiction extends to transit through the territory of the host state before or after trial. At least the government of the Netherlands (host to both the International Criminal Court as well as to the International Court on the Former Yugoslavia) assumes so; hence, suspects on transit to those Courts, acquitted persons and persons convicted to imprisonment in another state can lodge asylum requests with the Netherlands which are subject to the Dutch obligations under international asylum law (see the Letter of the Minister of Justice to the President of the Second Chamber of Parliament on the International Criminal Court Implementation Act, *Kamerstukken II* 2001/02, 28 098 (R1704), nr. 13, pp. 4-5 and 7-8, accessible at <http://www.overheid.nl>).

¹⁰⁸ Cf. Article 1(3) of Framework Decision 2002/584/JHA: “*This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union*”.

¹⁰⁹ Article 1 read in conjunction with 2(a) QD.

¹¹⁰ “*“Unaccompanied minor” means a person below the age of eighteen who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States*” (Article 2(h) PD). Article 5(4)(c) PD (see the following footnote) implies that married persons under eighteen may be treated as adults in domestic legislation.

¹¹¹ Article 5(4): “*Member States may determine, in national legislation (a) the cases in which a minor can make an application on his/her own behalf; [...] (c) the cases in which the*

lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.” As the definition of “applicants” does not refer to age we cannot read Article 5(4)(a) PD *a contrario* to the effect, that in absence of relevant domestic legislation minors cannot lodge an application on his own behalf.

¹¹² Articles 23(4)(o), 25(2)(g) and 33(7) PD.

¹¹³ Preamble (13) PD.

¹¹⁴ UNHCR Handbook 192 under ii: “*The applicant should receive the necessary guidance as to the procedure to be followed*”, and under iv: “*The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned*”.

¹¹⁵ Article 9(1)(a) PD; likewise, Article 3(4) DR requires that the applicant is informed of application of the Regulation, its time limits and its effects.

¹¹⁶ Article 9(1)(b) PD.

¹¹⁷ Article 7(4) PD.

¹¹⁸ Article 13(1) PD.

¹¹⁹ Article 13(2) PD.

¹²⁰ Article 8 PD; Article 19(2) and 20(1)(e) DR require that the decision not to examine the application and to transfer the applicant to another Member State “*shall set out the grounds on which it is based*”.

¹²¹ Article 9(1)(e) PD; Articles 19(2) and 20(1)(e) DR require that the applicant be “notified” of the negative decision.

¹²² Cf. Article 4(3) and 4(5) QD, see under numbers [282] and [283].

¹²³ Amended Proposal PD, Comment on Article 10.

¹²⁴ Article 11(3)(a) PD. In case of an unaccompanied minor, the interview must be held by “*a person who has the necessary knowledge of the special needs of minors*” (Article 15(4)(a) PD).

¹²⁵ Article 9(1)(b) PD; cf. UNHCR Handbook 192 under (iv), quoted in footnote 114.

¹²⁶ Article 11(3) PD.

¹²⁷ Article 11(2) PD; accordingly, family members should, in principle, not be present - Article 11(1) PD.

¹²⁸ Article 14(4) PD.

¹²⁹ Article 12(1) PD.

¹³⁰ Article 12(2) PD. Cf. Article 12(3): “*Member States may request the applicant’s approval on the contents of the report of the personal interview. Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant’s file. The refusal of an applicant to approve the contents of the report of the personal interview shall not prevent the determining authority from taking a decision on his/her application.*”

¹³¹ Article 38(1) PD: “*Member States shall ensure that applicants for asylum have the right to an effective remedy [...] against the following: (a) a decision taken on their application for*

asylum, including a decision: (i) to consider an application inadmissible pursuant to Article 25(2) [...].”

¹³² Article 10(1) PD.

¹³³ Article 10(1) PD. Domestic legislation may provide that the “personal interview” is held with the representative of an unaccompanied minor, in the latter’s absence (Article 15(1) PD last clause).

¹³⁴ Article 10(6) PD.

¹³⁵ Article 20(1) PD; see on the Directive’s rules on implicit withdrawal further par. 6.4.2.

¹³⁶ Article 10(6) is “without prejudice to” Article 20(1) PD.

¹³⁷ Article 10(3) PD.

¹³⁸ Cf. Articles 11(5) and 12(4) PD. The relevant requirements were mentioned under number [397].

¹³⁹ Article 10(3) PD.

¹⁴⁰ Article 10(2)(c) and 23(4)(c) PD.

¹⁴¹ Article 10(2)(c) and 23(4)((a), (g), (h) and (j) PD; cf. number [431].

¹⁴² Article 10(4) PD.

¹⁴³ The “further” examination would take place in the ‘normal examination procedure’ or the ‘border procedure’, cf. number [380] above; during that procedure, the subsequent applicant would then be protected from *refoulement* pursuant to Article 6(1). This protection would lose all sense and meaning if the applicant could have been expelled before.

¹⁴⁴ Both Article 20(1) and Article 38(1)(c) PD state that the outcome of the preliminary procedure to discontinue examination is a “decision”.

¹⁴⁵ Amended PD Proposal, Commentary on Article 6.

¹⁴⁶ Preamble recital (5) PD: “*The main aim of this Directive is to introduce a minimum framework in the European Community on procedures for the determination of refugee status, ensuring that no Member State expels or returns an applicant for asylum in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*”.

¹⁴⁷ Preamble recital (7) PD.

¹⁴⁸ Arguably, Article 34(2) last clause presupposes a right to access to procedures. The provision first lists a number of rules (in fact requirements) that the Member States may “*inter alia*” impose upon subsequent applicants. Then, Article 34(2) states that these “conditions shall not render the access of applicants for asylum to a new procedure impossible nor result in the effective annulment or severe curtailment of such access.” But this clause cannot reasonably be construed as if it encompasses all basic guarantees of Article 5, the right to access (see number [394]). It follows from the term “*inter alia*” that other requirements (in fact restrictions) on the right to access may also be imposed. Furthermore, it is stipulated that these “conditions” should not “result” in “*severe curtailment of such access*” – some or

even considerable curtailment would hence fall within the scope of appreciation of the Member States.

¹⁴⁹ Cf. the Amended PD proposal, Commentary on Article 35 p. 16: “*a special approach to applications made at a border post is proposed [that] allows Member States to “fall below” common procedural standards*”.

¹⁵⁰ That is, without prejudice to the exceptions on the prohibitions of *refoulement* ex Article 6(2) (see number [393]).

¹⁵¹ Cf. Articles 8, 9(1)(c), (d) and (e) and 13(2) PD.

¹⁵² But he should have the opportunity to make use of the services of an interpreter during the interview, cf. Articles 9(1)(b) and 35(3) second indent PD.

¹⁵³ Cf. Articles 17 and 14 PD.

¹⁵⁴ Cf. Articles 9(1)(c) and 21 PD.

¹⁵⁵ Article 35A(2) PD.

¹⁵⁶ Article 38(1)(a)(iii) PD, see number [421].

¹⁵⁷ Article 35A(5) PD.

¹⁵⁸ So Boeles 1997, pp. 133-140.

¹⁵⁹ The French and Russian language versions quite explicitly refer to civil rights proceedings: “*des contestations sur ses droits et obligations du caractère civil*”, “*при определении его прав и обязанностей в каком-либо гражданском процессе*” (literally, “when defining his rights and obligations in some civil proceeding”).

¹⁶⁰ According to McGoldrick 1994, pp. 397-399, the views of the HRC on the matter are far from clear. In its view of 15 November 2000, CCPR/C/70/D/547/1993 (*Apirana Mahuika et al. v. New Zealand*), the Human Rights Committee “[...] notes that article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1). (...) The Committee considers that whether or not claims in respect of fishery interests could be considered to fall within the definition of a suit at law [...]” (par. 9.11). Arguably, it follows that the Human Rights Committee still assumes that the determination of rights and obligations of administrative nature may fall outside the scope of the Article.

¹⁶¹ HRC 29 March 2004, CCPR/C/80/D/1051/2002 (*Ahani v. Canada*), par. 10.9.

¹⁶² Boeles 1997, pp. 75-77 and 81-83.

¹⁶³ The Article is placed in Chapter II of the Refugee Convention, headed “juridical status”. Boeles (*o.c.*) states that if a national has a right of appeal on decisions concerning his “juridical status”, a refugee is entitled to the same treatment if status determination and admission are concerned. But the notion of “juridical status” is a vague one. It has not been established, as far as I know, that international law or common Member State practice confers in general a right of appeal against decisions on someone’s juridical status. Furthermore, as Spijkerboer and Vermeulen point out, Article 16(2) RC does not prohibit

the contracting State to take account of the special position of refugees (Spijkerboer & Vermeulen 1995, p. 381).

- ¹⁶⁴ Article 6(1) ECHR: “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*”
- ¹⁶⁵ ECtHR 21 February 1975, Ser. A vol. 18 (*Golder v. UK*), par. 36.
- ¹⁶⁶ ECtHR 5 October 2000, Rep. 2000-X (*Maaouia v. France*), par. 40.
- ¹⁶⁷ ECtHR 25 March 1983, Ser. A vol. 61 (*Silver and Others*), par. 113.
- ¹⁶⁸ ECtHR 27 April 1988, Ser. A vol. 131 (*Boyle and Rice*), par. 55: “*The Court does not think that it should give an abstract definition of the notion of arguability. Rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 was arguable and, if so, whether the requirements of Article 13 were met in relation thereto.*”
- ¹⁶⁹ ECtHR 26 March 1987, Ser. A vol. 116 (*Leander*), par. 77.
- ¹⁷⁰ ECtHR 21 February 1990, Ser. A vol. 172 (*Powell and Reyner*), par. 33.
- ¹⁷¹ ECtHR 9 October 1979, Ser. A vol. 32 (*Airey*), par. 18, affirmed in *Boyle and Rice*, par. 54.
- ¹⁷² ECtHR 7 March 2000, Rep. 2000-III (decision) (*T.I. v. UK*), under “Concerning Article 13 of the Convention”.
- ¹⁷³ ECtHR 29 June 2004, Appl. No. 6276/03 and 6122/04 (decision) (*Taheri Kandomabadi v. The Netherlands*): “*The Court has found above that the applicant’s complaints under Articles 2 and 3 about the rejection of his request for asylum are manifestly ill-founded. It follows that the applicant does not have an “arguable claim” and these complaints do not attract the guarantees of Article 13.*”
- ¹⁷⁴ ECtHR 6 September 1978, Ser. A vol. 28 (*Klass*), par. 67.
- ¹⁷⁵ *Silver and Others*, par. 113.
- ¹⁷⁶ ECtHR 7 July 1989, Ser. A vol. 161 (*Soering v. United Kingdom*), par. 121; ECtHR 30 October 1991, Ser. A vol. 215 (*Vilvarajah*), par. 123.
- ¹⁷⁷ ECtHR 11 July 2000, Rep. 2000-VIII (*Jabari*), par. 50; ECtHR 5 February 2002, Rep. 2002-I (*Čonka*), par. 79.
- ¹⁷⁸ ECtHR 15 November 1996, Rep. 1996-V (*Chahal*), par. 151.
- ¹⁷⁹ *Jabari*, par. 50: “[T]he notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned”.

- ¹⁸⁰ *Jabari*, par. 49.
- ¹⁸¹ See on the implications of Article 13 ECHR for asylum proceedings also Essakili 2005.
- ¹⁸² Cf. *Vilvarajah*, par. 118, ECtHR 2 May 1997, *Rep.* 1997-III (*D v. UK*), par. 66, *T.I. v UK*, under 3, third par., ECtHR 6 March 2001, *Rep.* 2001-II (*Hilal v. UK*), par. 78 and ECtHR 6 February 2001, *Rep.* 2001-I (*Bensaid v. UK*), par. 51.
- ¹⁸³ *Bensaid*, par. 57.
- ¹⁸⁴ *Hilal*, par. 37, *Bensaid*, par. 28.
- ¹⁸⁵ Verdussen 2000, pp. 45-50.
- ¹⁸⁶ ECtHR 7 December 1976, Ser. A vol. 24 (*Handyside v. UK*), par. 48, ECtHR 18 December 1998, *Rep.* 1996-VI (*Aksoy v. Turkey*), par. 51.
- ¹⁸⁷ E.g. *Hilal*, par. 63.
- ¹⁸⁸ ECtHR (First Section) 6 February 2003, Appl. No. 46827/99 and 46951/99 (*Mamatkulov I*), par. 96. The Grand Chamber ruling *Mamatkulov II* of 4 February 2005, Appl. No. 46827/99 and 46951/99, likewise stresses that proceedings before it should be “effective” (pars. 101 and 102), although it does not address these particular requirements.
- ¹⁸⁹ McGoldrick 1994, pp. 285-286; for example HRC 30 July 1993, No. 470/1991 (*Kindler v. Canada*), pars. 13.1 and 13.2.
- ¹⁹⁰ McGoldrick 1994, pp. 279-281 and 285-287; Boeles 1997, pp. 117-118.
- ¹⁹¹ Boeles 1997, pp. 107-111.
- ¹⁹² The HRC views Boeles invokes either concerned Article 9(4) CCPR as well, which provision explicitly demands appeal to a court in case of alleged unlawful detention, or concerned cases where the domestic system happened to provide for judicial appeal.
- ¹⁹³ Such a reading would further run counter to the ‘incremental system’ of Refugee Convention benefits – see paragraph 8.2.2.
- ¹⁹⁴ UNHCR Handbook, par. 192 under (vii).
- ¹⁹⁵ Hoge Raad 13 May 1988, *RV* 1988, 13, par. 3.1 (my translation, HB): “[*The state argues that*] the question of violation of the prohibition of refoulement in Article 33 of the Geneva Convention by the Netherlands authorities [...] can occur only in case it is plausible for the moment that the alien is a refugee as meant in the Convention. It follows from this argument that an alien who claims to be a refugee is not protected by Article 33 of the Geneva Convention in the situation – according to the court, concerned here – that for the moment only one thing is certain: that it has not been proved that between reasonable people there can be no doubt that the alien, considering objectively, is not in a flight situation. This argument cannot be accepted as correct. It fails to appreciate the fact that in the last mentioned situation too the protection offered by Article 33 can not be missed, in order to give objective and purpose of the provision its due”.
- ¹⁹⁶ Preamble recital (28) PD.
- ¹⁹⁷ ECJ 17 December 1998, C-185/95, [1998] *ECR*, p. I-08417 (*Baustahlgewebe GmbH v. Commission*), pars 20 and 21: “It should be noted that Article 6(1) of the EHRC provides

that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...] The general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights [...], and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law.”

¹⁹⁸ CFI 29 June 1995, T-30/91, [1995] ECR, p. II-1775 (*Solvay v. Commission*), par 101.

¹⁹⁹ ECJ 15 May 1986, C-222/84, [1986] ECR, p. 621 (*Johnston v. Chief Constable of the Royal Ulster Constabulary*), par. 18: “*The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As ... the Court has recognised in its decisions, the principles on which that Convention is based must be taken into consideration in Community law*”.

²⁰⁰ Cf. for example the cases quoted in footnotes 197 and 199.

²⁰¹ ECJ 27 November 2001, C-270/99, [2001] ECR, p. I-09197 (*Z v. European Parliament*).

²⁰² *Z v European Parliament*, pars. 23-24.

²⁰³ Opinion A-G Alber 24 October 2002, C-63/01, n.y.p. (*Samuel Sidney Evans v. The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers’ Bureau*), par 85, relying on both case-law of the European Court of Justice on relevant general principles of Community law, and using Article 47 Charter as a “*a standard of comparison, at least in so far as it addresses generally recognised principles of law*” (par. 80). The United Kingdom had argued that Evans’ claim fell outside the scope of Article 6(1) ECHR. The European Court of Justice did not explicitly address the applicability of Article 6 ECHR (ECJ 4 December 2003, C-63/01, n.y.p.).

²⁰⁴ Article 6(3) ECHR: “*Everyone charged with a criminal offence has the following minimum rights: [...] c. to defend himself in person or through legal assistance of his own choosing [...]*”

²⁰⁵ That is, “*in all respects other than their scope*”, see immediately below; CHARTE 4473/00 p. 41, CONV 828/1/03 REV 1 p. 41.

²⁰⁶ CHARTE 4473/00 p. 41, CONV 828/1/03 REV 1 p. 41.

²⁰⁷ Thus, in contrast to the text of Article 13 ECHR, a “*violation*” is not required (cf. number [411] above).

²⁰⁸ ECtHR 21 February 1975, Ser. A vol. 18 (*Golder v. UK*), par. 36.

²⁰⁹ Article 52(4) Charter: “*Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*” (see number [143]).

- ²¹⁰ Relevant case law of the European Court of Human Rights relies on the French language version, which speaks of “*contestations sur des droits et obligations du caractère civil*”, cf. ECtHR 23 October 1985, Ser. A vol. 97 (*Bentham v. The Netherlands*), par. 32.
- ²¹¹ Article 38(1) PD.
- ²¹² Article 38(2) PD.
- ²¹³ Article 9A(1) and (2)(a) PD. Article 9A concerns obligations of the applicant towards “competent authorities”, including appeal authorities (cf. number [390]).
- ²¹⁴ Article 38(6) PD.
- ²¹⁵ Article 38(4) PD.
- ²¹⁶ Article 17(2) PD.
- ²¹⁷ Article 38(1) PD.
- ²¹⁸ Article 9(2) read in conjunction with 9(1)(d) PD.
- ²¹⁹ Article 9(1)(e) PD. This duty to inform applies “*in accordance with Article 8(2)*” PD, that is, “*in conjunction with the negative decision*” no information on how to challenge it has to be given “*where the applicant has been informed at an earlier stage either in writing or by electronic means accessible to the applicant*” on the matter.
- ²²⁰ Article 9(2) read in conjunction with 9(1)(b) and (c) PD.
- ²²¹ Articles 8(2) and 12(2) PD, cf. numbers [396] and [397] above.
- ²²² Article 7(3) PD.
- ²²³ Article 14(1) PD.
- ²²⁴ Article 13(2) PD. According to Article 13(4) PD, the Member States may provide for rules on “*modalities for filing and processing such requests*”.
- ²²⁵ Article 13(3) PD. The right to free legal assistance may further be restricted by imposing monetary and time limits (Article 13(5) PD).
- ²²⁶ Article 38(3) PD.
- ²²⁷ Article 14(1) PD.
- ²²⁸ It will be remembered that Article 6 PD prohibits expulsion only up to the decision at first instance (see number [392]).
- ²²⁹ Vermeulen 2003, pp. 441-442.
- ²³⁰ Article 25(2)(b) and (c) PD.
- ²³¹ Article 25(2)(f) and (g) PD.
- ²³² Article 25(2)(a) PD.
- ²³³ That is, “*the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of [the Qualification Directive]*”- Article 25(2)(d) PD (see below).
- ²³⁴ Article 25(2)(e) PD: “*the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of a status pursuant to (d)*”.

- ²³⁵ Article 25(1) PD.
- ²³⁶ Cf. Article 3(1) DR.
- ²³⁷ Article 29(1) PD.
- ²³⁸ Article 19(1) PD.
- ²³⁹ Article 20(1) PD.
- ²⁴⁰ As in the case of explicit withdrawals, cf. Article 19(1) PD.
- ²⁴¹ Article 20(1) under (a) PD.
- ²⁴² Article 20(1) under (b) PD.
- ²⁴³ Other provisions may address particular grounds mentioned under Article 23(4) – cf. Article 10(2) PD (number [399] above). But then it is Article 10(2) that attaches the legal consequence, not the “manifest unfoundedness”.
- ²⁴⁴ Cf. Council doc. 8158/04 of 5 April 2004, Asile 2004/24: Article 29(2): “*In the cases mentioned in Article 23(4) [...], Member States may also consider an application, if it is so defined in the national legislation, as manifestly unfounded and may apply rules under Article 39(3)(b)*”; Article 39(3)(b): “*Member States [...] may provide in their national legislation that appeals or reviews according to Article 38 shall not have the effect of allowing the applicant to remain in the Member State concerned in the following cases: (b) where the application is considered to be unfounded pursuant to Article 29(1) and any of the cases listed in Article 23(4) apply*”. The latter provision confirms that “manifestly unfounded” cases were considered “unfounded” for the purposes of Article 29(1) PD.
- ²⁴⁵ Article 23(4)(a) and (b) PD.
- ²⁴⁶ Article 23(4)(g) PD.
- ²⁴⁷ Article 23(4)(j) PD.
- ²⁴⁸ Article 23(4)(c) PD.
- ²⁴⁹ Article 23(4)(d), (e) and (f) PD.
- ²⁵⁰ Article 23(f), (i), (k), (l) and (n) PD.
- ²⁵¹ Article 23(4)(m) PD.
- ²⁵² Article 23(4)(h) and (o) PD.
- ²⁵³ Preamble recital (15) PD.
- ²⁵⁴ See for a detailed discussion of the implications of Articles 3, 13 and 35 ECHR for the examination of subsequent applications Van Rooij 2004, pp. 17-30 and 34-39.
- ²⁵⁵ Cf. number [281] and Article 4(3)(a) QD.
- ²⁵⁶ Article 33(1) PD.
- ²⁵⁷ It appears that in the context of Article 33(1) PD, the term “subsequent applicant” addresses all three types of subsequent applications. The provision is headed “subsequent applications” and addresses in the second and seventh paragraphs all three types (see immediately below in the main text). As to withdrawn applications, the provision could not possibly apply before a decision to discontinue examination (cf. Article 20(1) PD) has been reached.
- ²⁵⁸ See for the meaning of the terms “decision” and “final decision” numbers [379] and [398] above.

- ²⁵⁹ Article 33(2)(b) read in conjunction with 20 PD.
- ²⁶⁰ Article 33(4) PD speaks of examination “in conformity with Chapter II”.
- ²⁶¹ Article 33(5) PD. According to Article 33(6) PD, “*Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 38*” [emphasis HB]. The obligatory language “may only” is out of place as no Procedures Directive provision, in particular Article 33(3), (4) or (5), states the obligation to apply the preliminary procedure, or turn down a subsequent application.
- ²⁶² Article 23(4)(h) PD.
- ²⁶³ Cf. ECtHR 6 March 2001, *Rep.* 2001-II (*Hilal*), par. 56.
- ²⁶⁴ *Hilal*, par. 62.
- ²⁶⁵ *Hilal*, pars. 60f. Likewise, the European Court of Human Rights paid no attention to the circumstance that certain evidence relied on by the applicant (a report by Amnesty International) was brought in well after the rejection of the asylum claim and the appeal against the rejection in its judgement of 7 July 2005, appl. no. 2345/02 (*Said v The Netherlands*).
- ²⁶⁶ Article 33(7) PD. Arguably, in the latter provision justification of not a separate application, but of a separate examination is meant: the making of an application is, under the Procedures Directive, not subject to approval of the authorities; moreover, the gist of the ‘preliminary procedure’ is sorting out whether a full examination is warranted or not.
- ²⁶⁷ Article 25(2)(g) PD.
- ²⁶⁸ Article 5(4)(c) PD.
- ²⁶⁹ Cf. Article 5(3) PD, see number [394] above.
- ²⁷⁰ Article 23(4)(o) PD.
- ²⁷¹ Article 20(2) PD: “*Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 is taken, is entitled to request that his/her case be re-opened, unless the request is examined in accordance with Articles 33 and 34*”. It would appear from the wording that the obligation to offer the opportunity to request for re-opening or to examine it in the preliminary procedure applies only in case of a “decision to discontinue the examination”, and hence not when the Member State decided to “reject” the implicitly withdrawn application pursuant to Article 20(1), and even less to a decision based on Article 19, that is, after “explicit” withdrawal of the application. However, Article 38(1)(b) requires the possibility of appeal from “a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20”. Despite the wording of Article 20(2), we must therefore assume that its provisions apply to any decision on an implicitly or explicitly withdrawn application pursuant to Articles 19 and 20 PD. Likewise, the preliminary procedure may be applied to subsequent applications after explicit withdrawals ex Article 20 PD.

- ²⁷² Article 33(4) PD.
- ²⁷³ Cf. Preamble recital (17) PD.
- ²⁷⁴ See for an analysis of differences and similarities between the concepts of the safe third country and the safe country of origin Hailbronner 1993, pp. 31-66.
- ²⁷⁵ Protocol (29) on asylum for nationals of Member States of the European Union (1997), *OJ* [1997] C 340.
- ²⁷⁶ See Steenbergen et al. 1999, pp. 148f.
- ²⁷⁷ See on the matter extensively Noll 2000, pp. 536-557.
- ²⁷⁸ Hathaway 1991, pp. 80-1.
- ²⁷⁹ Article 10(2)(c) read in conjunction with 23(4)(c) PD; cf. number [399].
- ²⁸⁰ Situation as of 1 August 2005. For a time, the Council considered adoption of an Annex containing a “common minimum list” together with the Directive, hence by unanimity voting. As it did not manage to reach “full agreement” on a list that would “be useful in practice” (Council doc. 14383/04, Asile 2004/65 of 9 November 2004, pp. 2-3), it was decided to adopt the Procedures Directive without the list. Adoption by “qualified majority voting” allows for overruling Member States that do not consider some particular country of origin as safe.
- ²⁸¹ Preamble recital (19) PD.
- ²⁸² Preamble recital (20) PD.
- ²⁸³ Article 15(2) ECHR addresses next to torture also other forms of ill-treatment meant in Article 3 ECHR, and further the right to life, freedom from slavery and servitude, and from retroactive criminal liability.
- ²⁸⁴ This term seems to be designed to cover both types of serious harm defined in Article 15(b) and (c) QD.
- ²⁸⁵ According to a statement to the Council minutes *re* Annex II PD, “*The Council stresses its support for the abolition of the death penalty, as expressed in Protocols No. 6 and 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms. However, the Council recognises that ceasing to impose and execute the death penalty is a significant step towards abolishing the death penalty and encourages countries to continue their progress towards this end*” (Council doc. 8771/04, Annex III, p. 66). It seems that the Council holds that the occurrence of death penalties does not preclude safety, whereas “execution” does. In the absence of reference to this statement in the Directive, it has however “no legal significance” for the interpretation of the Annex (see number [73]).
- ²⁸⁶ Article 30A(1) PD.
- ²⁸⁷ *Ibid.* In the absence of a similar statement in Article 30 PD, we must assume that the “common minimum list” cannot designate parts of countries as safe. It appears that pursuant to this arrangement, the “internal flight alternative” (see number [317] above) may count as a “safe part of a country of origin” for the purposes of Article 30A (and 30B) PD. Article 8 read in conjunction with⁷ QD allow for assuming that internal protection is offered by third

parties or international organisations (number [320]. But as the actor of protection should “observe” relevant international obligations (Annex II under (b) PD), only a state could provide for protection for the purposes of the safe country of origin arrangement.

²⁸⁸ Article 30A(2) PD.

²⁸⁹ Annex II requires that the country does so “generally and consistently” (see number [450]).

²⁹⁰ Or stateless persons, formerly habitually resident in that country – Article 30B(1) under (a) and (b) PD.

²⁹¹ Confirms, as this obligation follows from Article 23(1) read in conjunction with 29(1) PD. Cf. Preamble recital (21) PD.

²⁹² Cf. Preamble recital (21) PD: “*By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her* [emphasis added, HB]”.

²⁹³ Article 30(3) PD.

²⁹⁴ Article 30(4) PD - a proposal for removal submitted by the Commission on its own initiative does not, apparently, suspend the obligation.

²⁹⁵ Article 30(6) PD.

²⁹⁶ The term “*motifs sérieux*” in Article 2(e) QD refers to the relevant term in Strasbourg case-law on Article 3 ECHR. Article 4(1) QD in the French language version throws little light on the matter, where it speaks of “*étayer sa demande*”.

²⁹⁷ Like the French one, Article 4(1) in the Dutch language version is neutral where it speaks of “*staving van het verzoek*”. – Arguably, the term “*zwaarwegende gronden*” in the Dutch language version of Article 2(e) QD is a translation error. For the standard refers to the term “substantial grounds” as employed by the European Court of Human Rights (cf. number [15]); and the latter term is translated as “*substantiële gronden*” (so “substantial”, not “serious” grounds) in Article 29(1)(b) of the Dutch Aliens Act 2000 (*Stb.* 2001, 495).

²⁹⁸ Cf. Preamble recital (21) PD: “*The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her*”.

- ²⁹⁹ Maybe the safe country of origin arrangement is rather a standard on qualification for refugee or subsidiary protection status than a standard on procedures. If so, Article 63(1)(c) and (2)(a) TEC provide for its legal basis. But legislation pursuant to these provisions also sets minimum standards.
- ³⁰⁰ Preamble (7) PD, defining the “nature” of minimum standards – see number [259].
- ³⁰¹ Article 30B(2) refers to countries “designated as safe pursuant to Article 30” PD only.
- ³⁰² Article 30B(3) PD.
- ³⁰³ Article 30B(1) PD.
- ³⁰⁴ Noll 2000, pp. 537-540.
- ³⁰⁵ Noll 2000, pp. 540f.
- ³⁰⁶ See Article 1 of the Resolution on a Harmonized Approach to Questions concerning Host Third Countries (London, 30 November and 1 December 1992), recorded in Van Krieken 2000, p. 183 (cf. number [44]).
- ³⁰⁷ Article 4 elaborates on the obligation to have the application examined by the responsible Member State set out in Article 3(1) DR. Article 3(3) derogates from this obligation where it states that “*Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention*”. Cf. Article 9(1) DR.
- ³⁰⁸ Cf. Article 9(1) DR.
- ³⁰⁹ Boeles 1997, p. 78; see also number [546] below.
- ³¹⁰ Goodwin-Gill states that the concept of “due process” includes as minimum requirements (a) knowledge of the case against one, (b) an opportunity to submit evidence to rebut that case, (c) reasoned negative decisions and (d) the right to appeal against negative decisions to an impartial tribunal (Goodwin-Gill 1998, p. 307). We should observe that the second requirement in Article 32(2) covers the first three issues mentioned by Goodwin-Gill (Steenbergen et al. 1999, p. 162). Further, the French language version speaks of “*une décision rendue conformément à la procédure par la loi*”, and hence lacks an equivalent to the word “due”. It seems that the Article demands decision making in accordance with the law in all circumstances; the additional requirements mentioned under Article 32(2) RC apply only when there are no compelling reasons of national security. The right to appeal before an impartial tribunal (mentioned by Gill under d) not being mentioned in Article 32(2), it seems unreasonable to assume it nevertheless applies (Steenbergen et al. 1999, pp. 162-3).
- ³¹¹ HRC 9 April 1981, No. 58/1979 (R.13/58) (*Maroufidou v. Sweden*), “*The reference to “law” in this context is to the domestic law of the State party concerned [...]*”.
- ³¹² HRC 29 March 2004, CCPR/C/80/D/1051/2002 (*Ahani v. Canada*), par. 10.8.
- ³¹³ General Comment on the position of aliens under the Covenant, GAOR/41, sup. 40, p. 119.
- ³¹⁴ Boeles 1995, pp. 106-7.
- ³¹⁵ Boeles 1995, pp. 107-108, referring to relevant views and scholarly comments.
- ³¹⁶ Article 36 PD: “*Member States shall ensure that an examination may be started to withdraw the refugee status [...; emphasis added, HB]*”

³¹⁷ Article 37(4) PD.

³¹⁸ Article 2(k) PD.

³¹⁹ Article 37(1) PD.

³²⁰ We may observe that for the purposes of the Procedures Directive, the term “refugee status” means recognition by a Member State of a third country national as a “*person who fulfils the requirements of Article 1 [Refugee Convention] as set out in [the Qualification Directive]*” (Article 2(g) and (f) PD). It would follow that Article 37 PD does not address withdrawal of status because the grounds meant in Article 33(2) RC apply (Article 14(4) QD), for such a person would still be a refugee in the sense of Article 1 RC. Read to object and purpose Article 37 PD also addresses withdrawal of refugee status pursuant to Article 14(4) QD.

³²¹ Article 36 PD.

³²² Article 37(4) PD.

³²³ Article 37(1) PD. Article 2(e) and 3A PD (cf. paragraph 6.2.4.1 above) address only authorities dealing with applications, not with withdrawal.

³²⁴ Article 37(1)(c) PD; cf. Article 7(2)(b) PD.

³²⁵ Article 36 speaks of the examination to withdraw the status “of a particular person”.

³²⁶ Article 37(1)(a) and (b) PD.

³²⁷ Or to those who pose a threat to life and freedom of his family members; Article 37(1)(d) PD. Cf. Article 22 PD.

³²⁸ Article 37(2) and (3) PD; see on the Chapter II guarantees referred to numbers [396] and [423] above.

³²⁹ I.e. either by expiry of the time limit stated in that decision or, before that moment, by a Council Decision adopted by qualified majority upon a Commission proposal - Article 6(1) TPD.

³³⁰ Article 28 TPD, see number [340].

³³¹ As art. 36-37 PD address “withdrawal of refugee status”, the rules cannot apply to subsidiary protection in a way similar to those on “applications for asylum” (cf. number [362]).

³³² Preamble recital (5) PD.

³³³ Preamble recitals (6) and (3) PD.

³³⁴ Preamble recital (5) PD.

Chapter 7

Allocation and safe third country arrangements

In the Common European Asylum System, the exception of the safe third country functions in two ways. First, Member States may apply the exception and expel to applicant to a safe non-Member State. Then, the merits of the application for asylum are not considered within the European Union. This topic is addressed in paragraphs 7.4 and 7.5. Second, the system for allocation of applicants within the European Union (the “Dublin system”) is a variant of the exception of the safe third country. This topic is addressed in paragraphs 7.2 and 7.3.

7.1 Introduction

[475] Member States do not have to examine the merits of a claim for protection “where it can be reasonably assumed that another country would do the examination or provide sufficient protection”¹ – in other words, when the exception of the safe third country applies.² In this context, the country of origin is labelled the first country, the Member State where he made his claim the second, and the state to which he is expelled, the third country.

European asylum law provides for five variants of the safe third country exception. To begin with, the Dublin Regulation allows for the “transfer” of applicants to another Member State that is “responsible” for examining their claims (1). Further, the Procedures Directive offers three arrangements on the designation of non-EU Member States as safe third countries.³ Article 27 PD addresses the “safe third country concept” at large, and may apply to any third country, and to any applicant for asylum (2). Article 26 PD lays down a particular variant of the safe third country exception that also may apply to any third country, but only to applicants who have already found a form of durable protection - the “country of first asylum” concept (3). Article 35A establishes a special examination regime for expulsion of illegal applicants who enter or have entered from a neighbouring non-Member State (4). Finally, according to Article 25(2)(a) PD, an application may be declared inadmissible if another Member State has recognised the applicant as a refugee - that is, if another Member State is a “country of first asylum” (5). To this list we may add a sixth arrangement that does not form part of Community law, but functions in its context: expulsion (“transfer”) to Denmark or to the non-Member States Iceland, Norway and Switzerland pursuant to the Dublin Convention or rela-

ted agreements (6). I will address them in the context of the discussion of the Dublin Regulation (i.e. variety (1)).

The “safe third country concept” essentially embraces two elements: criteria for establishing responsibility for processing a claim for protection, and rules for securing readmission of the asylum seeker.⁴ In paragraph 7.2 I address the criteria for establishing responsibility or “allocation criteria” laid down in the several arrangements, in paragraph 7.3 procedures on readmission. In paragraph 7.4 I discuss the implications of international asylum law for application of safe third country exception. Whether the six arrangements mentioned above meet these requirements is the subject of paragraph 7.5.

7.2 Allocation criteria

The Dublin Regulation, its predecessor the Dublin Convention and related agreements regulate allocation of applicants within the European Economic Area (henceforth also: EEA). These instruments are discussed in paragraph 7.2.1. For allocation of temporary protection beneficiaries, the Temporary Protection Directive sets separate rules, which will be discussed in paragraph 7.2.2. The allocation criteria that can be detected in the various safe third country arrangements laid down in the Procedures Directive are addressed in paragraph 7.2.3.

7.2.1 Allocation of applicants within the European Economic Area

Scope

[476] The European Economic Area was established by agreement between the Community and the European Free Trade Association (henceforth also: EFTA) that currently consists of Norway, Iceland, Switzerland and Liechtenstein. The Dublin Regulation and related agreements under international law regulate allocation of applicants within this European Economic Area.

The Dublin Regulation itself regulates the allocation of applicants among all Member States apart from Denmark. The predecessor to the Dublin Regulation, the Dublin Convention, still applies to transfers between those Member States and Denmark; an agreement that renders the content of the Dublin Convention regulates allocation among all Member States and the

EFTA states Iceland and Norway.⁵ The Community signed new agreements with Denmark and EFTA state Switzerland that render the content of the Dublin Regulation, Dublin Application and Eurodac Regulations (which agreements have not yet entered into force); in the future, a similar agreement should replace the present agreement with Iceland and Norway. The Dublin Application Regulation already “applies” to both EEA states.⁶ Together, these instruments thus cover the whole of the European Economic Area, except for Liechtenstein.

[477] These instruments do not address allocation within that Area of all persons entitled to CEAS protection statuses. The Dublin Convention applies only to “a request whereby an alien seeks protection from a Member State under the Geneva Convention by claiming refugee status within the meaning of Article 1 of the [Refugee Convention]”;⁷ hence not to persons who (explicitly) request subsidiary or temporary protection status. The Dublin Regulation applies to “applications”, that is to any “application for international protection, unless a third-country national explicitly requests another kind of protection that can be applied for separately”.⁸ This personal scope encompasses necessarily all (future) beneficiaries of refugee status, as well as all subsidiary protection status beneficiaries in those Member States that run a single procedure for examining applications for both statuses.⁹ Neither the Dublin Regulation nor any other instrument of Community asylum law addresses allocation of applicants who explicitly request subsidiary protection in states that examine applications in separate procedures.

Objectives

[478] Before the entry into force of the Dublin Regulation, the Dublin Convention applied to allocation of applicants between all Member States. The Dublin Regulation is intended

“while making the necessary improvements in the light of experience, to confirm the principles underlying the [Dublin] Convention”.¹⁰

What are the “principles underlying” the Dublin Regulation and the Dublin Convention? Both instruments are flanking measures for the establishment of an area without internal frontiers, “open to those who, forced by circumstances, legitimately seek protection in the Community”.¹¹ This entails a dual aim (cf. paragraph 4.4). First, prevention of “secondary movements” made possible by the abolition of border controls or, as the Explanatory memorandum to the Proposal for the Dublin Regulation puts it,

“to prevent abuse of asylum procedures in the form of multiple applica-

tions for asylum submitted simultaneously or successively by the same person in several Member States with the sole aim of extending his stay in the European Union”.¹²

Though not explicitly stated, the “principle” that serves to achieve this aim is the “one-chance only principle”: applicants should not have the opportunity to lodge subsequent applications in different Member States.¹³ Thus, the Dublin Convention and the Dublin Regulation seek to establish that only one Member State is responsible for processing a claim on behalf of all Member States.

Second, it serves the aim of securing access to protection. If several states consider each other as safe third countries, none of them will examine the merits of the claim of an applicant but expel them to each other. As a result, the applicant is a “refugee in orbit”: neither expelled to his country of origin, nor able to find a safe haven.

The Dublin Regulation serves to prevent this kind of situation and to “guarantee effective access to the procedures for determining refugee status”¹⁴; moreover, it “seeks to ensure full observance of the right to asylum guaranteed by Article 18 [Charter]”.¹⁵ The Dublin Convention should “guarantee adequate protection to refugees in accordance with the terms of the [Refugee Convention]”, and “provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum”.¹⁶

Whether both instruments do indeed secure access to protection will be addressed below, under number [483]. The allocation criteria that should reflect these principles are “objective” and “fair [...] for the Member States and for the persons concerned” and in particular, they should allow for “rapid decision making”.¹⁷

[479] Thus, the principles underlying both the Dublin Regulation and the Dublin Convention are that the applicant’s claim to protection should be considered by one Member State only, that his access to protection is secured, and that decision-making should be rapid. The Dublin Regulation moreover hints at an equitable allocation of responsibility where it speaks of principles that are “fair for the Member States concerned”, and where it refers to the necessity of striking “a balance between responsibility criteria in a spirit of solidarity”.¹⁸ The question of in which respects the Dublin Regulation brought the “necessary improvements” (as envisaged according to its Preamble) will be addressed after discussion of the responsibility criteria.

Responsibility for determining responsibility

[480] Both the Dublin Convention and the Dublin Regulation set rules on establishing responsibility for two issues. First, they contain rules for determining which Member State is responsible for the examination of an application. These rules are laid down in Articles 5 to 14 DR (and Articles 4 to 9 DC; see below).

Second, they establish which Member State is responsible for that determination, that is, which Member State must sort out, by applying those criteria, which Member State is responsible for examination of the claim. This second form of responsibility rests in principle with the Member State with which the application was lodged.¹⁹ This rule is subject to three exceptions. First, if an application is lodged with a Member State by an applicant present in another Member State, the latter state must determine which Member State is “responsible” under the regulation criteria, and is regarded as the state with which the application was lodged.²⁰ Second, the responsibility of the state where the application was lodged ceases, when the applicant left its “territories” for over three months, or, third, obtained a residence permit from another Member State.²¹

Responsibility for considering applications

[481] The Dublin Regulation states in Articles 6 to 14 criteria for determining the Member State responsible for considering applications for asylum. These criteria apply in the order in which they appear in the Regulation.²² Thus, only if Article 6 does not apply, can a Member State be responsible according to Article 7, and so on. The criteria can be divided into three groups.

- (1) Criteria concerning family unity. Articles 6-8 and 14 DR bestow responsibility to the state where a family member of the applicant is present.²³ These criteria seem inspired by human rights considerations, especially respect for family life and the rights of the child,²⁴ but also by efficiency considerations: applications of family members can be processed more quickly by one Member State.²⁵ These rules concerning family unity will be further discussed below in paragraph 8.7.3.
- (2) Criteria concerning a state’s involvement in the legal or illegal entry of the applicant. A state is responsible if
 - (a) it issued a visa or residence permit to the applicant;²⁶
 - (b) the asylum seeker entered it illegally, coming from a non-Member State. This ground of responsibility expires 12 months after the alien entered the Member State²⁷ or,
 - (c) if the previous grounds do not (or no longer) apply, the applicant has lived for a continuous period of at least five months in it;²⁸

- (d) if the applicant did not need a visa to enter that state (and hence could not enter it illegally), entered it legally;²⁹
 - (e) the applicant, on his way to a non-Member State, lodged his application at the transit zone of an airport on its territory.³⁰
- (3) If none of these criteria apply, the responsibility lies with the Member State where the asylum seeker lodged his application, hence presumably the state of his preference.³¹

[482] These criteria do not exhaustively regulate the allocation of responsibility for examination of applications: both the Dublin Regulation as well as the Dublin Convention set supplementary rules. The obligations implied by responsibility cease (for practical purposes, the “responsibility” ceases) when the applicant has left the “territory” of the (formerly responsible) Member State for at least three months,³² or when another Member State has issued a residence document to the applicant.³³ Failure to meet the time limits in the procedures for establishing responsibility entails transfer or acquisition of responsibility (see below numbers [490] and [491]). Finally and most importantly, Member States can themselves voluntarily assume responsibility. The “Sovereignty clause” of Article 3(2) DR confirms the sovereign right of the states to process any application for asylum lodged with them.³⁴ Further, pursuant to the “humanitarian clause” (Article 15 DR), Member States can assume responsibility also for claims lodged elsewhere, and for which they are not responsible pursuant to Articles 5-14 DR, on “humanitarian grounds” (see further number [616]).³⁵

[483] The Dublin Convention contains the same types of grounds for responsibility that apply in the same order,³⁶ but the Dublin Regulation criteria differ from them in two important respects. First, the grounds for responsibility concerned with family unity are far more elaborate, and hence are likely to have far greater numerical impact (see further number [615]). Second, cessation of responsibility because of illegal entry after twelve months (ground 2(b)) and incurring responsibility because the alien has been present for five months (ground 2(c)) are absent in the Dublin Convention.

Both changes in the allocation criteria seem to serve to bring “necessary improvements” referred to in the Preamble to the Dublin Regulation (see number [478] above). The first set of criteria serves to preserve family unity. As to the second set of criteria, we may observe that the changes brought by grounds 2(b) and (c) shift responsibility from the states where illegal immigration into the European Union takes place, i.e. border states, to the countries of destina-

tion of those illegal immigrants. Does the arrangement serve to promote burden sharing between the Member States, that is, a more equitable distribution of applicants? Noll has shown that the Dublin system of allocation rather has the opposite effect, and leads to concentration of the burden.³⁷ We should note that all the criteria of the second group put responsibility on the state that made the applicant's entry into the European Union possible, with the exception of ground 2(c). This new arrangement provides the border Member States with an interest in better registering immigration, and may therefore improve the functioning of the Dublin system. We should finally observe that if the rationale behind allocating responsibility for illegal entry was to provide an incentive to reinforce border controls, the Dublin system now also provides an incentive to reinforce the control on illegal presence.

7.2.2 Allocation of temporary protection beneficiaries

[484] The Temporary Protection Directive does not set up an alternative system for the allocation of displaced persons (or for allocation of responsibility for them). But Chapter VI of the Directive, on "solidarity" between the Member States, does provide for some rules that should contribute to equitable distribution.³⁸ First, expenses made for temporary protection can be compensated for from the European Refugee Fund - a form of financial burden sharing.³⁹ Second, "physical" burden sharing, i.e. distribution of displaced persons over the Member States should take place "in a spirit of Community solidarity".⁴⁰ This means that the Member States must indicate their reception capacity, which information is published in the Council decision introducing temporary protection.⁴¹ This may very well lead to both political and media pressure on Member States to adapt reception numbers to those of other Member States. Finally, Member States must co-operate on the transfer of beneficiaries.⁴²

[485] European asylum law is unclear about the relation between the allocation rules in the Dublin Regulation and the Temporary Protection Directive. Persons applying for temporary protection are, in principle, applicants for asylum in the sense of Article 2(d) DR.⁴³ The Dublin Regulation therefore may, in principle, apply to them. Under the Community rules for asylum procedures, a Member State may reject an application because another state is responsible according to the Dublin Regulation, without examining the merits of the claim (cf. number [427] above). Temporary protection therefore does not affect the working of the Dublin system, for the responsibility criteria will usually be

applied before the grounds of the application are considered (cf. number [465], hence before addressing the question of whether or not the applicant is a temporary protection beneficiary. The Council decision installing temporary protection may offer clarification.

How does transfer according to the Temporary Protection Directive as described above fit into the Dublin system? The Dublin Regulation offers two grounds for voluntary responsibility. On the basis of Article 3(2) DR, the Member State where an application was lodged may assume responsibility for it, and under Article 15 DR a state may take over relatives on humanitarian grounds. It is unlikely that the physical burden sharing scheme of the Temporary Protection Directive was intended to be restricted to these categories. Arguably, “transferral” as meant in Article 26 TPD might take place in other cases also, that is to a state where the applicant did not request protection, and has no relatives.

Article 18 TPD states that in the context of “access to asylum procedures” (the heading to the chapter where the provision is placed) the Dublin Regulation rules apply;

“[i]n particular, the Member State responsible for examining an asylum application submitted by a person enjoying temporary protection pursuant to this Directive, shall be the Member State which has accepted his transfer onto its territory”.

Neither the Dublin Regulation nor the Temporary Protection Directive elaborates how these grounds for responsibility fits into the criteria system of the Dublin Regulation; the provision seems to refer to responsibility based on Article 9 DR, ground 2(a) as mentioned under number [481]. Domestic law implementing Article 18 TPD does not have precedence over the directly applicable Regulation provisions Article 6 till 8 DR. Thus, notwithstanding Article 18 TPD, the applicant can invoke the Articles 6, 7 and 8 DR concerning family unity.

7.2.3 Allocation to non-Member States

[486] The allocation criteria laid down in the safe third country arrangements in the Procedures Directive are far less elaborate than those discussed above. Articles 26, 27 and 35A PD all set or imply only two criteria.

Under Article 35A(1) PD (which applies in case of illegal entry from certain neighbouring non-Member States – see number [383]), responsibility lies first with the neighbouring third country, where the applicant was previously

present. The safe third country exception of Article 27 PD applies in case of a “connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country”.⁴⁴ The Procedures Directive does not determine when this connection is established. Both provisions stipulate that if the third country does not readmit the applicant, the expelling Member State (where the application was lodged) shall “ensure” that “access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II” PD.⁴⁵ This does not necessarily entail that the expelling Member State, the state where the application was lodged, will examine whether the applicant qualifies for refugee or subsidiary protection. For pursuant to the Dublin rules for responsibility, this obligation may rest with another Member State.

Article 26 PD applies if an applicant “has been recognised as a refugee in a non-Member State,” and can still avail himself of that protection, or if he “enjoys otherwise sufficient protection” there. Thus, responsibility lies in the first place with the non-Member State that previously offered protection, and second with the Member State that is responsible according to the Dublin Regulation criteria.

[487] Article 27 PD applies to non-Member States, and hence also to Norway, Iceland and Switzerland (unless Article 35A PD would apply). Arguably, the Dublin allocation rules provide for the “connection” with these states as required by Article 27 PD. The obligation to readmit and process the application ex Article 27 PD concurs with the obligation to do so ex Articles 10 and 13, and 3 DC (see numbers [481] and [482]).

7.2.4 Concluding remarks

[488] The allocation criteria of all arrangements discussed above share one feature: the preferences of the applicant play only a modest role. Under the Dublin Regulation, a Member State is responsible for an applicant on account of presence of a family member only “provided that the persons concerned so desire”.⁴⁶ Through the “connection” requirement, the preferences of the applicant are relevant for application of Articles 27 and 26 PD (the safe third country and first country of asylum exceptions). The implications of these criteria for performance under international asylum law will be discussed in paragraph 7.4. But we may observe that as international asylum law does not grant a right to asylum from the state preferred by the protection seeker (see num-

ber [11]), the criteria discussed above are not in themselves at variance with international asylum law.

7.3 Allocation mechanisms

Introduction

[489] In addition to allocation criteria, the safe third concept embraces allocation mechanisms (cf. number [475]). Both the Dublin Regulation as well as the Dublin Convention set elaborate rules on the procedures for determining which state is responsible, which I will discuss briefly below. European asylum law does not establish procedures for securing admission to non-EU Member States when the safe third country, the first country of asylum or the safe neighbouring third country exceptions are applied. Such procedures or mechanisms may be laid down in readmission agreements between the Community (or individual Member States) and these third countries.⁴⁷

“Rapid” decision-making figures among the objectives of both the Dublin Regulation and the Dublin Convention (number [478]). The Dublin Convention has been criticised because its application caused long processing delays.⁴⁸ One of the “necessary improvements” brought by the Dublin Regulation addresses the time limits that apply in the transfer procedures. Moreover, the Eurodac Regulation establishes a system for the comparison of fingerprints, which should “facilitate the implementation” of the Dublin Regulation.⁴⁹ Implementation rules that are relevant for procedures are further laid down in the Dublin Application Regulation.

The Dublin Regulation and the Dublin Convention distinguish between procedures for “taking charge”, and procedures for “taking back” applicants. An applicant is “taken charge” of when the application was made in a “different” (i.e. non-responsible) Member State and has not yet been examined by the responsible Member State, and “taken back” when the application has been withdrawn, or when it is being examined and the applicant absconded to another Member State without permission, or when it was rejected.⁵⁰

Procedures for taking charge

[490] Both instruments set time limits for three subsequent state actions. First, for the request “to take charge”, that is, the request to another state to accept its responsibility; second, for the reply by the requested state; and third, for the transfer if the requested state accepts its responsibility.

Unlike the Dublin Convention, the Dublin Regulation distinguishes between normal and accelerated procedures for taking charge. The accelerated procedure applies when an application “was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order and/or where the asylum seeker is held in detention”.⁵¹ In both variants, the request for taking charge must be made within three months of the application being lodged.⁵² This time limit is fatal: if exceeded, the Member State where the application was lodged is responsible.⁵³ The time limit applying under the Dublin Convention is twice as long (and also fatal).⁵⁴

Under the Dublin Regulation, the requested state must react within two months;⁵⁵ if the request was “urgent” (and hence the ‘accelerated’ procedure applies), it must react if possible within the time-limit set by the requesting Member State or ultimately within one month.⁵⁶ Both time limits are fatal.⁵⁷ Under the Dublin Convention, the time limit is set at three months, and also fatal.⁵⁸

If the requested state accepts its responsibility, transfer of the applicant must, according to the Dublin Regulation, take place within six months of it being accepted, or after appeal if appeal has suspensive effect; again, all time limits are fatal.⁵⁹ The Dublin Convention sets the period for transfer at one month, which appeared to be unduly short; moreover, this time limit is not fatal.⁶⁰

Taking back

[491] The Dublin Regulation establishes a procedure for taking back applicants that takes far less time. No time limit for the request to take back is set, but in fact it must be made within three months of the applicant leaving the other Member State.⁶¹ If the request is based on data from the Eurodac system, the time limit for reply is two weeks, otherwise one month.⁶² Transfer must take place within six months of the requested Member State acceptance, or after the appeal against this decision.⁶³ All time limits are fatal.⁶⁴ Under the Dublin Convention, the requested Member State must reply within eight days, and the transfer must take place within one month; neither of these time limits is fatal.⁶⁵

Proof and exchange of information

[492] In order to further smooth the procedure for determining responsibility, the Dublin Regulation establishes rules on the elements of (formal) proof and circumstantial evidence. A means of “proof” is sufficient for establishing responsibility, but “circumstantial evidence” suffices only if it is “coherent,

verifiable and sufficiently detailed to establish responsibility”.⁶⁶ The Dublin Regulation and the Dublin Application Regulation elaborate what exactly counts as “proof” and what counts as “circumstantial evidence” for the application of the various provisions.⁶⁷ For example, for establishing family ties, extracts from registers count as proof, statements of family members as circumstantial evidence.⁶⁸ The Dublin Convention itself does not address the means of proof. The Committee established by Article 18 DC laid down rules on the matter in its Decision 1/97 (cf. number [43]).

In addition, and finally, the Dublin Regulation contains rules on exchange of information on applicants. Member States have the obligation to communicate personal data necessary for determining responsibility, for examining the application and for “implementing any obligation arising under this Regulation”,⁶⁹ that is in particular for taking charge of or taking back the applicant. Of particular relevance in this connection is information from the Eurodac system.

The personal data to be communicated may concern the identity, travel route and place of residence of the applicant, as well as the date of application and the stage of procedures.⁷⁰ Grounds for decisions may be communicated only “if necessary”, and if the applicant approves.⁷¹

Concluding remarks

[493] The Dublin Regulation does not regulate transfer procedures exhaustively: according to Preamble recital (9) DR,

“[t]he application of this Regulation can be facilitated, and its effectiveness increased, by bilateral arrangements between Member States for improving communications between competent departments, reducing time limits for procedures or simplifying the processing of requests to take charge or take back, or establishing procedures for the performance of transfers”.

Such agreements may be considered desirable, as the Dublin Regulation does not necessarily do away with the processing delays. The maximum time span for taking charge from application to transferral under the Dublin Regulation is 11 months (or 10, if the accelerated procedure applies), as compared to 10 months under the Dublin Convention. We should bear in mind that after the transfer, the examination of the applicant has yet to start – an examination that should in principle take no longer than six months, so the Procedures Directive suggests (see number [376]). Still, the procedures have improved in that all time limits under the Dublin Regulation are fatal, and that the applicant is left in doubt for a shorter time as regards the outcome of his application in the

non-responsible Member State. The stricter rules on proof and information exchange may result in a quickening of transfer proceedings.

7.4 The exception of the safe third country in international law

7.4.1 Introduction

[494] From the perspective of international law, the Dublin allocation system, the “safe country of first asylum concept”, the “safe third country concept” and the “safe third neighbouring country procedure” are all variants of the same concept – the exception of the safe third country. What is the basis for this concept in international law? In paragraph 1.4.2 we saw that states are free to expel aliens, unless treaty obligations forbid them to do so. The prohibitions of *refoulement* abridge this right to expel, but only to a limited extent: they prohibit expulsion that results in *refoulement*. States may expel persons in need of protection to other states.⁷² Meanwhile, the prohibitions of *refoulement* also set conditions on expulsion to such states. Obviously, expulsion to a third state is in breach of the prohibitions of *refoulement*, if it amounts to “direct *refoulement*”- if the alien has a well founded fear of being persecuted, or runs a real risk of being subjected to ill treatment by or in that third state.⁷³ Furthermore, all prohibitions of *refoulement* forbid “indirect *refoulement*”, that is expulsion to a state, where the alien is at risk of being subsequently expelled to a state where he fears persecution or ill treatment.⁷⁴ Hence, the application of the safe third country exception raises the question of when a third state may be regarded as “safe”. In paragraph 7.4.2 I will discuss which conditions apply to the third country.

[495] Application of the safe third country exception raises yet another question: how should the second state assess the safety of the third state? Here, we should distinguish between the assessment of the risk of persecution or serious harm in the first country, and assessment of the risk that the third state will expel the alien contrary to the prohibitions of *refoulement*. According to Articles 25(2) PD, 19(1) and 20(1)(e) DR, the Member States do not have to examine the foundedness of the claim if one of the variants of the safe third country applies. Hence, when the Member States expel aliens pursuant to these arrangements, they have not assessed whether the alien has well-founded fear of persecution or runs a real risk of ill-treatment in his country of ori-

gin. In and of itself, omitting this examination is not at variance with international law: the state may do without examination as long as it treats the alien *as if* he were entitled to protection, for the prohibitions of *refoulement* forbid expulsion, if it has not been established that the third state will offer effective protection from *refoulement*.⁷⁵ If the second state manages to establish that the alien can get effective protection in the third state, it can expel him. Hence, expulsion without previous examination of the merits of the case is compatible with the prohibitions of *refoulement*, if it is sufficiently sure that the third state is safe.⁷⁶

But another question is whether states can properly assess the safety of the third state without addressing the particular circumstances of the claim. Can states rely on the mere fact that the third state ratified relevant instruments of international law? Or should the second state assess in each individual case the safety of the third state in the particular circumstances of that case? And does such an examination entail assessment of the risk on human rights violations in the first state? These questions will be discussed in paragraph 7.4.3.

7.4.2 Conditions on the third state

Introduction

Third states can offer effective protection from indirect *refoulement* in two ways: by granting permission to stay, or by offering access to an examination procedure. Both ways will be discussed below under the heading “durable solution”. Next, I discuss some other requirements that have been suggested in views by monitoring bodies or academic writing: admission to the third state, observance of basic human rights in the third state, and the alien’s previous presence in or close ties with the third state. Some other factors relevant for considering a third state safe, such as ratification of relevant instruments of international law and its co-operation with monitoring bodies, are more conveniently addressed in paragraph 7.4.3.

Durable solution

[496] The third state can afford effective protection from *refoulement* in several ways.⁷⁷ Spijkerboer and Vermeulen observe as regards to Article 33 RC, that one way would be the issue of a permission of some sort to stay in the third state. As there is no risk of expulsion then there is no risk of breach of the prohibition on indirect *refoulement*. As it is this result that counts, it does

not matter on what grounds the permission is granted. Hence, refugee status determination by the third country is not required.

The same reasoning applies to Article 3 ECHR. In *T.I. v UK*, the European Court of Human Rights had to rule on expulsion of an applicant from Sri Lanka (the first state) by the United Kingdom (the second state) to Germany (the third state), and addressed the question which safeguards the third state should offer. In this context,

“[t]he Court’s primary concern is whether there are effective procedural safeguards of any kind protecting the applicant from being removed from Germany to Sri Lanka”,

that is, whether the proceedings in Germany could offer T.I. “effective protection”.⁷⁸ But the Court’s final considerations in *T.I. v UK* make clear that “effective protection” can be afforded also by other means than procedural safeguards:

“the Court finds that it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention. Consequently, the United Kingdom have not failed in their obligations under this provision by taking the decision to remove the applicant to Germany. Nor has it been shown that this decision was taken without appropriate regard to the existence of adequate safeguards in Germany to avoid the risk of any inhuman or degrading treatment (see e.g. *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, §§ 97-98, *Nsona and Nsona v. the Netherlands* judgment of 28 November 1996, *Reports* 1996-V, § 102, and *D. v. the United Kingdom* judgment of 2 May 1997, *Reports* 1997-III, § 52)”.

Thus, the second state complies with its obligations under the prohibition on indirect *refoulement* if it has “appropriate regard” that the third state provides for “adequate safeguards” of some kind. The case law referred to gives indications as to the kind of safeguards that would be adequate. They may follow not only from “effective procedural safeguards”, as addressed in the case of *T.I.*, but also from undertakings by the expelling state to take away such risk, as discussed in the paragraphs of *Soering* to which the Court refers,⁷⁹ or from the offer of appropriate reception, addressed in the cases of *Nsona* and of *D v UK*.⁸⁰ Arguably, the same approach applies to the other prohibitions of *refoulement*.⁸¹

[497] A third country, therefore, is safe if there is some safeguard that protects a particular applicant from expulsion to his country of origin, such as a previously issued residence permit. But usually, there will be no such safeguard for

the particular applicant. In such a case, there may nevertheless be a safeguard in the form of access to examination procedures in the third country. If it is sufficiently sure that the third country will sort out whether the applicant is in need of protection, the third state is safe for the purposes of the prohibitions of *refoulement*.

The matter is complicated as the third state can comply with the prohibition of *refoulement* in two ways. First, it can examine the foundedness of the claim for protection; second, it can in its turn apply the exception of the safe third country and expel the alien to a subsequent (fourth) state. Would the second state comply with the prohibition of *refoulement* if it foresees this second type of examination by the third state? Arguably, in case of imminent chain expulsion to a fourth state (and maybe further subsequent states), the second state cannot establish with sufficient certainty that the refugee will not, as a result of its expulsion, ultimately find himself at the frontiers of the first state.⁸² Arguably, then, the second state does not offer effective protection from *refoulement* if there is no prospect of a durable solution in the third (or a subsequent) state. Indeed, several authors state that the Refugee Convention requires that the refugee have access to a refugee status determination procedure in the third state, resulting in permission to reside if he is in fact a refugee.⁸³ Confirmation may be found in ExCom Conclusion from 1998, which states that the third state should offer the refugee the possibility “to seek and enjoy asylum”.⁸⁴ In this context, the possibility to seek and enjoy asylum is the possibility to obtain admission to the third state and to apply for asylum there (the right to obtain admission will be discussed below, under number [500]).⁸⁵ The same reasoning applies to the other prohibitions of *refoulement*.

In summary, effective protection from *refoulement* implies that (in the absence of an adequate safeguard for the particular applicant as discussed in the previous number) the second state will not expel an applicant to a third state unless it has established that the merits of his claim for protection will be examined in the third (or a subsequent) state.

[498] One might argue that the requirement of a durable solution for application of the safe third country exception as advocated here is in excess of the obligations under international law of the Member States, as it implies a right to status determination or even to asylum, both absent from international law. Indeed, the Refugee Convention does not in general confer a right to refugee status determination (see paragraph 8.2.4), and even less does the Refugee Convention or any other instrument of international law confer a right to asylum (number [11]). But we should observe that the requirement

of a durable solution in the third or subsequent state is not based on, and hence does not presuppose, a right to status determination or to asylum. Rather, it is a side effect of the prohibition of *refoulement*. The prohibition entails the same side effect in case a refugee reaches the frontier of a Contracting state, and the exception of the safe third country cannot be applied to him. For then, the Contracting state will have to condone his presence in order to comply with the prohibition of *refoulement* – that is, it will have to offer a durable solution.

Procedural safeguards

[499] Thus, all prohibitions of *refoulement* require that examination of the merits of the case will take place in the third (or a subsequent) state. This entails that in expulsion proceedings, the third state (and as the case may be, a subsequent state) should offer the procedural guarantees implicit in the prohibitions of *refoulement* (discussed above, in paragraphs 6.2.1 and 6.3.1).

Should the third state comply with the other procedural safeguards that the Member States must offer, such as Article 13 ECHR or 2 CCPR (cf. par. 6.3.1)? In itself, there is no reason to assume so. Other provisions than Articles 33 RC, 7 CCPR, 3 CAT and 3 ECHR may imply a prohibition of *refoulement* (see number [16]), but these have not yet materialised. There is no reason to assume that the absence of the safeguards in the third country required by, say, Article 2 CCPR, bars expulsion.

Arguably, however, Article 3 ECHR does in fact require that proceedings in the third state should comply with several standards set by Article 13 ECHR. It follows from *T.I. v UK* that Article 3 ECHR requires that the third state offers “effective protection”, and that it satisfies this condition if it offers “effective procedural safeguards”. In *T.I. v UK*, the discussion of the German (i.e. the third state’s) procedural safeguards by the European Court of Human Rights is narrowly tailored to the submissions of the parties, and therefore hardly allows for general conclusions on which conditions a third state should meet in order to offer “effective protection”. Still, we should note that the Court observes in this context that

“[a]s the previous deportation order against the applicant was made more than two years earlier, the applicant could not be removed without a fresh deportation order being made, which would be subject to review by the Administrative Court, and to which the applicant could make an application for interim protection within one week. He would not be removed until the Administrative Court had ruled on that application.”⁸⁶

Availability of an effective remedy (“review by the Administrative Court”) and

the suspensive effect of proceedings against a deportation order appear to be relevant for the assessment of the effectiveness of the German procedural safeguards. It appears that Article 3 ECHR requires that the third state offers an effective remedy that is up to the standards of Article 13 ECHR (cf. number [412]).

At first sight, this finding is remarkable, as it is Article 13, not 3 ECHR that requires presence of an effective remedy in the second, expelling state. But as discussed in Chapter 6.2.1, it follows from the *Jabari* judgement that Article 3 ECHR (not Article 13 ECHR) requires that the expelling state makes a “meaningful assessment” of the claim that the expulsion will lead to ill treatment. Further, Article 33 RC requires that applicants for refugee status can apply for leave to remain during appeal proceedings (see number [416]); the same reasoning applies to Article 3 ECHR. All these procedural safeguards that are implied by Article 3 ECHR are usually not addressed, because in cases of direct *refoulement* the individual can rely on the more explicit right to an effective remedy ex Article 13 ECHR. But in the assessment of the effectiveness of the procedural safeguards in the third state in *T.I. v UK*, Article 13 does not come into play: that provision addresses proceedings in the second, not in the third state. Therefore, all procedural requirements implicitly required for effective application of Article 3 ECHR come to the fore – and these show considerable overlap with Article 13 ECHR.

In summary, Article 3 ECHR requires that the third state offers “effective protection” from *refoulement*. Arguably, this effective protection entails that it should make a meaningful assessment of the claim, and offer an effective remedy in case of a negative decision.

Admission

[500] Does Article 33 RC require that the third state admits the refugee to its territory? Effective protection from indirect *refoulement* implies that access to the third state is secured, if only for the purpose of examination of his claim for protection. Otherwise, there would be no guarantee that the refugee has an opportunity to invoke the protection of Article 33 RC (see above).

The context, however, seems to suggest otherwise: whereas Article 33 RC does not mention a claim to seek admission, Articles 31 and 32 RC do. Articles 31(2) and 32(3) RC require that certain categories of refugees are allowed “a reasonable period and all the necessary facilities to obtain admission into another [third] country” or “a reasonable period to seek legal admission” into a third country. But arguably, these provisions address the opportunity to “obtain” or “seek” admission in a third country of the refugee’s prefe-

rence, whereas the condition of access implicit in Article 33 RC concerns mere admission, irrespective of the preferences of the refugee. Zwaan shows that the *travaux préparatoires* to the Refugee Convention confirm this reading: the drafters assumed that a state may not send a refugee to a third state without a visa giving access.⁸⁷ In summary, the effective protection required by Article 33 RC entails that the refugee has access to the third state for the purpose of examination of his claim to protection.

[501] As to Article 3 ECHR, the requirement of access was touched upon sideways in the judgement *Amuur v France*⁸⁸. Amuur and several other Somali had requested asylum in France. Asylum was denied, and they were expelled to Syria. In the meantime, they had been held in detention at an airport, not authorised to enter France. Amuur *cum suis* complained of detention contrary to Article 5(1)(f) of the European Convention (cf. number [604]). According to France, their forced stay at the airport did not amount to detention because they had the opportunity to leave the country and go to Syria. The European Court of Human Rights observed:

“[the] possibility [for asylum-seekers to leave voluntarily the country] becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees.”⁸⁹

Obviously the Court’s opinion on the “possibility” of going to Syria has much to do with the availability of protection up to Convention standards, an aspect to be discussed in paragraph 7.4.3 below. Although the consideration concerns Article 5 ECHR, we can, arguably, assume that the “preparedness” or “inclination” of the third state to take in the individual is a material factor for assessing the effectiveness of the protection under Article 3 ECHR as well.

Human rights standards in the third state

[502] According to ExCom, the third state should treat the refugee in accordance with “accepted international standards”.⁹⁰ A previous ExCom Conclusion spoke of “treatment in accordance with recognised basic human standards”.⁹¹ This view has found support in scholarly writing.⁹² But what standards exactly would apply? May we assume that the Refugee Convention for-

bids expulsion also in the case that the third state will not accord other Convention benefits, such as the right to schooling, housing, welfare and so on?⁹³ Arguably, object and purpose of the Refugee Convention plead in favour of this contention: the Preamble speaks of securing “the widest possible exercise” of human rights by refugees.⁹⁴ But it does not follow that a Contracting state is liable for any possible violation of Refugee Convention rights by a third state upon expulsion.⁹⁵ Article 33 RC prohibits expulsion to territories where the “life and freedom”⁹⁶ of the refugee are threatened, not where enjoyment of some Convention benefit like the right of access to the labour market is threatened. Moreover, the Refugee Convention provisions apply only if certain conditions are fulfilled – and most of them require the refugee’s presence in the Contracting state (see paragraph 8.2.1). Thus, the Convention provisions on the right to schooling, housing, welfare and so on entail requirements only for acts and conduct by the contracting state itself.⁹⁷ Liability of the Member States for denial of Convention benefits is therefore limited to their own acts, committed on their own territory.⁹⁸

As to international human rights law, the prohibitions of *refoulement* of Articles 7 CCPR, 3 CAT and 3 ECHR of course apply to expulsion to any state. As discussed under number [16], other provisions (such as Articles 2, 5 or 6 ECHR) may also or do implicitly prohibit *refoulement*. But these implicit prohibitions have not yet been substantiated; therefore, we cannot derive any further conditions on expulsion to third states from them.

In summary, international law does not require that the alien will be treated in the third country in accordance with other human rights than those addressed in the prohibitions of *refoulement*. A requirement of treatment in accordance with other basic human rights is, however, implied by the “right to asylum” of Article 18 Charter, to be discussed under number [504] below.

Close ties or previous presence

[503] In state practice, some variants of the exception of the safe third country restrict application to aliens who travelled through, or had previously found protection in the third state. According to ExCom Conclusion 15 (XXX) 1979, “Regard should be had to the concept that asylum should not be refused solely on the grounds that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.”⁹⁹

This text is almost identical to Article 1(3) of the Draft Convention on

Territorial Asylum,¹⁰⁰ a convention that was never adopted.¹⁰¹ It should be observed that a previously established tie with the third state is not worded as a hard condition (the Conclusion calls for mere “regard” to a “concept”). Besides, the Conclusion dates back twenty-five years, and it is doubtful whether the “concept” still prevails. Moreover, the Refugee Convention does not provide for a solid basis for the condition that the refugee had previously established ties with the third state.

In this context, Article 31 RC has occasionally been mentioned (quoted under number [546]).¹⁰² The provision defines as its personal scope unlawfully present refugees who have come “directly” from the state where they fear persecution. Most authors hold that the term “directly” should not be interpreted in a literal sense: the refugee who travelled without undue delay through a country or countries where he could not get “effective protection” has come “directly” in the sense of Article 31(1) RC.¹⁰³ A refugee who has not come “directly”, then, travelled through or established himself in states where he got or could have got effective protection – safe third countries.

It appears, then, that Article 31 RC draws a distinction between refugees to whom (a form of the) exception of the safe third country applies, and those to whom it does not. But as Zwaan points out, this distinction has only very limited consequences for the application of the exception of the safe third country.¹⁰⁴ Article 31(1) prohibits imposition of penalties for illegal entry and the first clause of Article 31(2) addresses unnecessary restrictions on the movements of the mentioned category of persons. These clauses offer no clue for assuming that the distinction between refugees who came “directly” and those who did not, is relevant for the application of other Refugee Convention provisions as well. In particular, a right of choice of the country of destination for refugees cannot be based on the provision, as the provision does not address that choice.¹⁰⁵ Only the last clause of Article 31(2) RC, on the reasonable period to obtain admission elsewhere, seems to have bearings on expulsion; this requirement was discussed already above (number [500]).

In summary, Article 31 RC does not require that the refugee has travelled through or otherwise established ties with the third state. The prohibitions of *refoulement* offer no clue for such a condition.

Article 18 Charter

[504] A brief remark should be made on the implications of Article 18 Charter, the right to asylum, for the application of the safe third country exception. We saw in paragraph 2.3.5 that the right to “asylum” implies a claim to a form of protection that should be both durable and “appropriate” in terms of secondary

rights. The obligation to guarantee this right concerns refugees, and may concern other persons in need of protection as well.

Thus, when an applicant is expelled to a third country, his right to asylum should be guaranteed. This implies, first, that his right to a durable form of protection should be guaranteed, a condition quite similar to the requirement that he should have the prospect of a durable solution (discussed under numbers [496] and [497]). Second, it implies that he should have the prospect of entitlement to an “appropriate” set of secondary rights. We observed above that according to ExCom recommendations, the third country should treat the refugee in accordance with basic human rights standards, but that this requirement cannot be based on the prohibitions of *refoulement* (numbers [502]). Presumably, ExCom inferred the requirement from the “right to seek and enjoy asylum” (which Member States are not bound to observe under international law, cf. number [11]). Arguably, entitlement to treatment in accordance with those “basic human rights” is implied by the right to asylum ex Article 18 Charter.

In summary, Article 18 Charter has one important implication for the application of the exception of the safe third country next to the obligations under international law: it requires that the right to an “appropriate” solution is guaranteed in the third country. Arguably, a country offers “appropriate” protection only if it treats applicants in accordance with “basic human rights standards”.

Conclusions

[505] The prohibitions of *refoulement* require effective protection from expulsion to a state where the alien fears persecution or serious harm. This protection can be offered in, basically, two ways. (1) The third state (or a subsequent state whereto the alien will be expelled) permits the alien to stay, or otherwise offers some guarantee to the effect that it will not expel the alien contrary to the second state’s obligations under the prohibitions of *refoulement* (number [496]). (2) If no such guarantee for the specific alien applies, he must have the opportunity to invoke the effective protection of the prohibitions of *refoulement* in the third state (number [497]). For the purposes of the application of the safe third country exception, this requirement is met with only if it is established that the merits of the claim will be examined by the third (or a subsequent) state. Further, this examination should be in accordance with the procedural guarantees implicit in these prohibitions: the third state must make a meaningful assessment of the claim, and suspend expulsion of a person who made an arguable claim until the claim has been considered to the merits

(number [499]). Finally, the alien should have access to the third state in order to be able to invoke the protection of the prohibitions of *refoulement* (numbers [500] and [501]).

The prohibitions of *refoulement* require that the alien will not suffer violation of the human rights addressed in those prohibitions in the third country (number [494]). Article 18 Charter implies that the applicant should, moreover, enjoy “appropriate protection” there, which arguably entails treatment in accordance with basic human rights standards (number [504]).

Article 31(2) and 32(3) RC require that states allow specific groups of refugees a reasonable period to obtain admission to a state of their preference. Due to their personal scope, the impact of the last two provisions on the actual application of the safe third country exception is modest. The safe third country exception is applied to requests for asylum, and hence not relevant for lawfully present recognised refugees who may be expelled (Article 32 RC – cf. number [562]). Further, the exception is usually applied to third states where the refugee was present before he came to the state where he requested asylum, and hence not relevant for refugees who came “directly” from the state where they feared persecution (number [503]).

7.4.3 Assessment of the safety

7.4.3.1 The individual and the generic approach¹⁰⁶

[506] A state can apply the exception of the safe third country in (basically) two ways. Firstly, it can make an individual assessment of the foundedness of every claim for protection. It then assesses whether or not the alien has well-founded fear of being persecuted (or runs a real risk of being subjected to serious harm) in his country of origin. If there is no such fear or risk, the prohibitions of *refoulement* do not apply and the second state can expel the alien to the third or to the first state. But if it finds that there is a risk of treatment contrary to the prohibitions of *refoulement* upon removal to country of origin, it will have to establish that the third state will offer the applicant for asylum the protection he is entitled to (as discussed in the previous paragraph).

As this approach entails full examination of the claim, states prefer a second option: assessment of the safety of the third country according to some generic definition. Then, no examination of fear or risk takes place. Instead, the second state assumes that the third country will not expel the asylum seeker contrary to any of its (the expelling, second) state’s obligations under inter-

national law. This assumption is usually based on ratification by the third state of relevant instruments of international law. Removal to the third state does not harm the protection seeker, as he can invoke the same treaty provisions as he could in the state where he made his request for asylum, so the argument runs.

Below, I will address at some length the validity of this generic approach, as it is the basis of most variants of the exception of the safe third country in European asylum law: the Dublin allocation system, the safe third country concept and the safe third neighbouring country procedure. The generic approach is less relevant when the country of first asylum concept or the Member State of first asylum provision is applied. Then, assessment of the safety by definition addresses the specific circumstances of the applicant.

[507] In an extreme form, the “generic approach” is based on two tenets. First, expulsion to a third country is in conformity with the prohibitions of *refoulement* if the third state is formally bound to those prohibitions.¹⁰⁷ Second, the assumption of safety on this ground is absolute, not open to rebuttal. This variant has met with criticism.¹⁰⁸ Noll points out that absolute trust based on mere ratification of treaties leads to unreasonable results, referring to a Swedish case on the expulsion of an Iraqi to Germany.¹⁰⁹ The Iraqi feared that Germany would expel him to Jordan, a country considered safe by Germany. Sweden on the other hand considered Jordan unsafe as it has not acceded to the Refugee Convention. Still, the Iraqi could be expelled to Germany, as this state was party to the same instruments as Sweden, and therefore safe. Hence, reliance on mere ratification of international law instruments may lead to the unreasonable result that a country may be an unsafe third, but a safe fourth country.

That ratification of the same treaties is not a sufficient basis for inter state trust also follows from state practice as well as from views of treaty monitoring bodies. In *Adan and Aitsegur*,¹¹⁰ the House of Lords addressed expulsions to Germany and France (in this context the third states). In contrast to the United Kingdom, Germany and France held the view that non-state actors cannot commit persecution acts; victims of such could therefore not be recognised as refugees by those states (see above, paragraph 5.4.2). The Lords ruled that Adan and Aitsegur could therefore not be expelled to Germany and France; in the circumstances of the case, these states were not safe third countries.

In *Korban v Sweden*, on expulsion of an Iraqi by Sweden to Jordan (the third state), the Committee against Torture “noted” that Jordan was party to the Convention Against Torture; nevertheless, it considered Jordan unsafe (and hence expulsion to Jordan contrary to Article 3 CAT).¹¹¹ In *T.I. v UK*, the fact

that Germany (the third country) was party to the European Convention of Human Rights could “not affect” the responsibility of the UK under that Convention, nor could it “rely automatically” on the Dublin Convention that might, arguably, provide for some additional protection. The assessment of the safety concerned both interpretation (once again, the non-state actors issue) as well as the application (credibility issues, see number [511] below).¹¹²

[508] Thus, the mere fact that a third state has ratified relevant instruments of international law does not allow for absolute trust that it is safe. More restrictive interpretation or improper application by the third state may render its protection from *refoulement* ineffective. Does it follow that a state may apply the exception of the safe third country only after an individual examination of each and every case? It was observed above (number [495]), that in itself there is no duty to examine the merits of a request for asylum. One could argue that effective protection from indirect *refoulement* entails that the second state should establish that the third country is safe for the particular applicant – which amounts to a duty to perform an individual examination to the merits (though not necessarily a complete examination, see below [511]).

However, this conclusion would render the fact that the other state is party to the same instruments of international law irrelevant. It would also imply that all European law on the interpretation and application of international law is completely irrelevant for Member State performance under those instruments. This conclusion is unreasonable: if another Member State is bound by European law to interpret or apply the Refugee Convention in a certain way, there is no reason to doubt it will do so.

7.4.3.2 The principle of inter-state trust as a rebuttable presumption

The concept

[509] Thus, absolute trust that a third state is safe cannot be based on mere ratification of instruments of international law. But requiring examination of each and every case is too strict: it renders all formal obligations nugatory. With this in mind, a sort of intermediate position between the individual and the generic assessment of the third country’s safety is defensible, as Spijkerboer and Vermeulen argue.¹¹³ Upon an application for asylum, the expelling state can refuse to examine the application to the merits of the claim on the assumption that a specific third country is *prima facie* safe. It can soundly base this *prima facie* trust on the fact that the other state ratified the

instruments of international asylum law and on other factors, to be discussed below. But this trust cannot be absolute, because state practice under those instruments may diverge. Hence, the applicant must have the opportunity to present counter evidence to the effect that the third country is not safe. If he succeeds, the exception of the safe third country cannot apply (and the second state could expel the alien only if examination of the claim shows that the alien has no well-founded fear of persecution and runs no real risk of serious harm). This approach, interstate trust as a rebuttable presumption, is in conformity with the obligations from the *refoulement* prohibitions, as it demands and allows for an individual assessment, if proper grounds are adduced that this is necessary. At the same time, it allows for taking due account of the third state's being party to asylum law instruments.

[510] To be sure, this approach does not entail that the burden of proving that the third country is safe falls upon the applicant. The expelling state must establish that the third state is safe; only when it has done so, can it rely on the presumption of inter state trust, and the burden of proof that this trust is unjustified shifts to the applicant.

Why does the burden of proving that the third state is *prima facie* safe rest upon the state, not the applicant? As observed above, if a state does not examine the merits of this claim, it must treat the applicant *as if* he is indeed a refugee (and *as if* he indeed runs a real risk of suffering serious harm). Hence, the state must act under the assumption that its obligations under international law are involved by the expulsion. As any expulsion of an applicant for protection may "in any manner whatsoever" result in *refoulement*, expulsion is *prima facie* in breach of the prohibitions of *refoulement*. It is therefore incumbent upon the state to rebut the assumption that expulsion amounts to *refoulement* by establishing the safety of the third state. In other words, the burden of proof that the prohibitions of *refoulement* do not prohibit expulsion of the refugee in the relevant case is upon the state.

T.I. v UK and Korban v Sweden

[511] Is this approach, the rebuttable assumption that the third state is safe according to some generic definition, in conformity with relevant obligations under international law? We saw above that the Refugee Convention does not require that refugee status determination before expulsion to a safe third state takes place; hence, it does not resist application of the principle of inter-state trust.

As to Article 3 ECHR, several authors hold that *T.I. v UK* implies an obli-

gation to examine the merits of the claim.¹¹⁴ Indeed, after having observed that Germany's ratification of the European Convention of Human Rights and the Dublin Convention does not absolve the UK from its responsibilities under the European Convention, the European Court of Human Rights considered the "*Alleged risk of ill treatment in Sri Lanka*" (the heading above the paragraph concerned). Only after it found that the presented materials gave rise to "concerns as to the risk" of ill treatment upon return to Sri Lanka (the first state), did the Court address the effectiveness of the protection from *refoulement* offered by Germany (discussed above, under number [499]). This order of examination, one may argue, implies that some examination of the merits is required. Further, the assessment of the German procedural safeguards concerned the circumstances of T.I.'s case: the allegation that Germany would state undue requirements on credibility, and the alleged improbability that Germany would offer protection, as T.I. feared ill treatment by non-state agents. Hence, the assessment of the safety of the third state addresses the issues identified by the examination of the individual case.

Yet these observations do not entail that the Court's reasoning is at odds with the generic approach as advocated above. Importantly, the European Court of Human Rights states that the UK cannot "rely *automatically* [...] on the arrangements made in the Dublin Convention" (emphasis added).¹¹⁵ The UK can therefore rely on them to a certain extent – to the extent that its inter-state trust in Germany is justified, I would say. T.I. however *prima facie* rebutted this trust: the Court noted that the applicant provided strong evidence before the Court, which had not been available to the German authorities when they dismissed the application. T.I. further alleged, referring to German state practice, that this evidence would not be granted due importance in the examination of his case upon removal. Therefore, the Court scrutinised the relevant German procedural safeguards. The examination of "the concerns as to the risk" of ill treatment upon removal to Sri Lanka served, arguably, to sort out whether scrutiny of the German safeguards was worthwhile. It is by no means evident that the "concerns as to the risk" were the only, or even the decisive factor for the Court to embark upon an assessment of the procedural safeguards in Germany.

[512] Hence, the Contracting states may rely to a certain extent on the fact that the third country is bound by the same instruments of international law as it is itself. Confirmation can, arguably, be found in *Amuur v France* (addressed under number [501]). In this judgement, the European Court of Human Rights took account of the fact that Syria, the state whereto France intended to expel

a Somali, was party to the Refugee Convention.¹¹⁶ Ratification of the European Convention of Human Rights also played a role in a decision by the European Commission of Human Rights that a third country was safe.¹¹⁷ If the protection seeker manages to *prima facie* rebut this trust in the third country, the Member State must assess the safety of that state only if the protection seeker can show there are “concerns as to the risk” of ill treatment in the country of origin. Arguably, this standard is more lenient than the one applying to cases of direct *refoulement* (i.e., “substantial grounds for the existence of a real risk”).¹¹⁸ Examination of the harm feared in the country of origin is required only as far as necessary to be able to properly assess the safety of the third state.

[513] Is the generic approach in the form advocated above also in conformity with Article 3 of the Convention Against Torture? In both cases wherein the Committee assessed the compatibility of expulsion to a third state with Article 3 CAT, it proceeded in two steps. First, it assessed the risk that the applicant would be submitted to torture in his country of origin.¹¹⁹ If such substantial grounds for assuming that risk exist, the risk on removal to that country of origin from the third state is assessed – the second step.¹²⁰ It is not entirely clear which standard of risk applies to expulsion by the third to the first state. In *Korban* the Committee spoke of “substantial grounds for believing that” the applicant “would be subjected to torture”, apparently a more lenient standard than the usual “foreseeable, personal and real risk”, but in a later view, the Committee applied as standard that it should concern a “third country where it is foreseeable that he may subsequently be expelled”.¹²¹

We saw above that there is no such risk if the third state offers protection from expulsion as meant in Article 3 CAT. In this context, relevant factors appeared to be the third state’s being party to the Convention and, moreover, the possibility of lodging a complaint against the third state with the Committee against Torture.¹²² The Committee’s view therefore refers to the principle of interstate trust (and being a party to the Convention as a basis for it), but hardly allows for definite conclusions on its application. It shows that the principle can indeed not be applied in an absolute manner - counter evidence must be allowed.

A notable difference between the approach by the Committee against Torture and the European Court of Human Rights concerns the assessment of the risk to torture or ill treatment in the first state. The Court, we saw above, proceeded to assess the safety of the third state after it had concluded that there were mere “concerns as to the risk” of ill treatment. The Committee on the other hand performs a full examination of the danger of torture after indirect *refoulement* to the

first state. Should we infer that Article 3 CAT indeed requires this full examination? I don't think so. The Committee against Torture has not yet shed light on the way the assessment of the safety of the third state relates to the danger of torture in the first one. It appears that if the expelling, second state does not perform an examination as to the merits of the claim but assumes that the danger of torture exists, it complies with the requirements of the Article – provided that it properly assesses the safety of the third state (i.e., sorts out whether or not expulsion to the first by the third state can be “excluded”).

[514] In summary, it appears that the generic approach in a modified form is compatible with relevant international law, and in particular with Articles 3 ECHR and 3 CAT as interpreted by the relevant treaty monitoring bodies. The object of the trust, the conduct that the third state is assumed to perform, was identified in paragraph 7.4.2. Thus, it must be established that the third state will offer effective protection from *refoulement* (that is, to the full personal scope of those prohibitions), either because it issued a residence permit of some sort, or because it will examine the case in a proper procedure et cetera. Here, we must address the basis of the trust. Which factors may duly serve to assume a third state will act in accordance with the mentioned conditions? And how weighty are those factors? For the firmer the trust is established, the harder it will be to rebut it.

The basis of inter-state trust

[515] When ratifying a treaty, states undertake to perform their obligations in good faith. Hence, the fact that the third state is party to the relevant instruments does provide a basis for trusting that it will act in accordance with the conditions set out above. We saw above that both the European Court as well as the Committee against Torture indeed considers ratification relevant factors. But obviously, the mere fact that a third state is party to the relevant instruments, offers only a weak basis for trust, which can therefore easily be rebutted. Stable state practice as to application of those instruments in conformity with the expelling state's standards strengthens the basis of trust, and harmonisation of domestic law implementing those instruments strengthens it further. The possibilities for rebuttal of the trust commensurately decrease.

Can the principle of interstate trust apply if two states maintain diverging interpretations of the same treaty? Hailbronner suggests so when he states that negative decisions on applications by other (third) states will be recognised by national courts only “if they can be reasonably assured that procedural and substantive standards of national asylum law, even if they differ, fulfil mini-

imum requirements under the Geneva Convention and general principles of law”.¹²³ As argued under numbers [133] and [134], the Refugee Convention (interpreted in accordance with relevant rules in the Vienna Treaty Convention) does indeed leave Contracting states a certain amount of discretion in some respects (for instance, in the qualification of refugees as “lawfully present”), but not in other respects – such as the qualification as a refugee. The latter standards are minimum requirements only in the sense that the Refugee Convention invites the Contracting states to apply an optimising interpretation of the instrument, in excess of their obligations under it (cf. number [223]). Thus, if domestic standards of the third country on implementation and application of Article 1 RC diverge from its one and true meaning, negative decisions to those standards cannot be recognised by the domestic courts of other states.

[516] Another question is whether or not ratification of the same instruments is *mandatory*. Can states base their trust on other factors as well, or should they always examine the claim themselves if the third country is not formally bound to the same obligations? Neither the decision of the European Court of Human Rights nor the view of the CAT discussed above allows for a definite answer to this question. But in the judgement *Amuur v France* (addressed already under number [501] and [512]), the Court spoke of “protection comparable”, and hence not (necessarily) identical to the protection expected in the expelling state, party to the European Convention. Further, the fact that Syria (the third state) was not a party to the Geneva Convention was relevant for the assessment of the “possibility” of going there. But expulsion became “possible” after “guarantees” by the Syrian authorities.¹²⁴ It appears, then, that being a party to the European Convention is not an absolute requirement for assuming a third state offers protection that is effective for the purposes of the prohibition on exposure to ill treatment abroad under Article 3: comparable obligations under international law are a relevant factor for assessing the effectiveness of the protection. Holding otherwise would bar the application of the exception to safe third countries that are not members of the Council of Europe.

Arguably, the reasoning of the European Court as to the European Convention of Human Rights applies to the other relevant instruments of international asylum law as well.¹²⁵ Thus, ratification by the third state of the Refugee Convention, the Convention Against Torture and the Covenant on Civil and Political Rights is not an absolute requirement for assuming the third state is safe; obligations under another - regional - instrument than the one invoked may provide a basis for inter state trust.

Finally, could prohibitions of *refoulement* in readmission agreements provide for a sufficient basis for inter-state trust? The matter is relevant in case the Community or Member States conclude agreements on readmission of applicants to third countries that are not bound by the Refugee Convention or the other relevant human rights treaties. Arguably, in principle, *refoulement* clauses in readmission agreements could offer protection “comparable” to the Refugee Convention and other instruments of international asylum law. In principle, for much depends on the content of such *refoulement* clauses as well as on the possibility for the applicant to rely on them.¹²⁶

[517] May a second state assume that a third country is safe, although it has not assumed by treaty or agreement an obligation to provide for comparable protection? Legomsky observes that influence of UNHCR on refugee issues in such countries provides to a certain extent for guarantees.¹²⁷ The German Constitutional Court also ruled that in the absence of an obligation under the Refugee Convention, co-operation with UNHCR allowed for the assumption that the third state would offer effective protection as required by Article 33 RC.¹²⁸ However, mere stable practice is subject to the receiving state’s discretion. Arguably, the presence of UNHCR in, or co-operation with UNHCR by the third state is hardly a factor to take into account, as the UNHCR’s role is limited to “supervising” (cf. number [31]) – and therefore hardly affects the power to expel. Hence, any presumption that a country not party to the Refugee Convention or bound by a comparable obligation is safe, has quite a weak basis, and is therefore more easily rebutted by the asylum seeker. Thus, co-operation with UNHCR cannot substitute an obligation under international law to comply with the prohibitions of *refoulement*.

Could the possibility to appeal to the other treaty monitoring bodies serve as a basis for inter-state trust?

As to Article 3 ECHR, the UK government stated in *T.I. v UK* that the Convention system provides for the required procedural safeguards.¹²⁹ Indeed Article 34 ECHR provides for the right to appeal against a violation of a Convention right, and Article 39 of the Rules of Court enables the protection seeker to request that the Court indicates an interim measure to the third country if it is a Contracting party: in this context, requiring the third country to suspend expulsion during proceedings.¹³⁰ Such a request is binding upon the addressed state (so the Court ruled three years after *T.I. v UK*).¹³¹ This right of appeal to the European Court of Human Rights therefore satisfies at least the basic requirements for a judicial remedy to be effective, mentioned above. Hence, if this argument of the UK government were accepted, each

Contracting state would offer “effective procedural safeguards” by virtue of its being party to the Convention. But the European Court of Human Rights did not take this judicial process into account when assessing the safety of third country in *T.I. v UK*. As Vermeulen points out, the approach proposed by the UK government runs counter to the very enforcement system of the Convention.¹³² It is on the Contracting states that the Convention puts the primary and unconditional responsibility to comply with their Convention obligations; the Court’s supervision on its observance by the states is of a subsidiary nature.¹³³ Relying on eventual appeal to the Court for undoing the risk of an expulsion possibly at variance with Article 3 ECHR would shift that responsibility to the Court. Moreover, according to Article 34 ECHR the Court has power, but no duty to carefully scrutinise each and every appeal – and often it will not be able to do so due to its huge caseload.¹³⁴

The Committee against Torture touched upon the matter in *Korban v Sweden*, where it addressed the risk of expulsion by Jordan (the third state) to Iraq (the state where Korban was in danger of being tortured). It “noted” in this context that Jordan was a party to the Convention Against Torture, but that the right to lodge individual complaints to the Committee did not apply.¹³⁵ Did the Committee imply that Jordan would have been safe if Korban could have complained against Jordan? This is unlikely. Though the Committee itself considers its views bind the Contracting states, it can not be unaware that this view is not widely shared (cf. number [35]). Moreover, complaints to the Committee address supervision over the application of the Convention by the Member States, and hence do not substitute for that application. But maybe the observation that Jordan did not accept the right to complain to the Committee nevertheless addresses the basis for trust in Jordan in an oblique way for, arguably, it differentiates the inter-state trust to which the ratification of the Convention gives rise, because of apparent reluctance to attach consequences as to protection for individuals.

In summary, if the third state is not bound by the same treaty law as the second state, comparable obligations under international law may provide a basis for inter-state trust. But mere state practice (thus, obligations being absent) or co-operation with UNHCR does not provide for a basis. Nor does the possibility to appeal to treaty monitoring bodies render the trust absolute.

The safe fourth country

[518] We have to address one final issue. The third state may itself expel the alien to another fourth state, which in turn may apply the exception, and so on.

For example, Member States may under the Dublin Regulation expel asylum seekers to the Member State “responsible” for “examining” the request, and this (third) state may, in turn (as the Procedures Directive explicitly allows), expel the asylum seeker to a (fourth) non-Member State, that again may apply the exception and expel the alien to a fifth state, and so on. What implications does such (possible) chain expulsion have for the assessment of the safety of the third state by the second state?

In principle, there is no reason why a state could not rely on the assumption that the third state will duly establish the safety of the fourth country, if this assumption is justified. We may distinguish between four types of situation, wherein the alien may seek to rebut the trust (in the expulsion procedure in the second state). Firstly, he may challenge the safety of the third state because of imminent chain expulsion to a fourth state that is considered safe by the third, but unsafe by the second state. In this situation, the presumption of trust is *prima facie* rebutted, and the second state can expel only if it has established that the applicant will be offered sufficient opportunity by the third state to rebut its presumption that the fourth state is safe. Secondly, the situation that both the third as well as the second state consider the fourth state safe. Here, the inter-state trust concerns the assumption that the third state will pay due regard to counter-evidence on the safety of the fourth state. Hence, it is incumbent upon the applicant to show that the fourth state will not take into account the counter-evidence he may produce there; if he can't, there is no reason that the second state should consider the safety of the fourth state itself. Thirdly, the situation that the third state deems the fourth state safe, and the second state has not established for itself the safety or otherwise of that state. Here, the assumption of inter-state trust would be *prima facie* rebutted. As we saw above, the prohibitions of *refoulement* prohibit expulsion to a state (here: the fourth state) if its safety has not previously been established. Hence, the fourth state ranks as unsafe unless established otherwise. Therefore, this situation is not different from the first.

Fourthly and finally, the third state could expel the applicant to a fourth state, but it is unclear to which fourth state. Here, two alternatives are possible. Either the second state manages to establish (on the basis of the third state's legislation on expulsion to third countries) that only expulsion to fourth states that it deems safe itself is imminent. This alternative does not differ from the second one; hence, expulsion to the third state is allowed for. Or the second state does not manage to do so, with the result that it remains unclear to which fourth states the alien may be expelled. For practical purposes, in this alternative the second state has not established the

safety of the fourth state. Hence, the situation is the same as the third one, and expulsion would be contrary to the obligations under the prohibitions of *refoulement*.

7.4.4 Conclusions

[519] International law allows for expulsion of protection seekers to a third country, if certain conditions are met. Most importantly, all prohibitions of *refoulement* prohibit expulsion to a third country resulting in subsequent expulsion to the country where the protection seeker runs a risk of being persecuted, ill-treated or tortured. This prohibition of indirect *refoulement* entails that the third state must provide for effective protection from *refoulement*. This requirement may be satisfied either because the third country provides for safeguards for the particular applicant (for instance, it issued him a residence permit), but also if examination of the merits of the application will take place in the third state (or in a subsequent state). The prohibitions of *refoulement* require that the examination be in accordance with some procedural safeguards: it must be rigorous and negative decisions should be open to appeal that should have suspensive effect. They further imply that the alien has access to the third state for the purpose of examination of the claim. The right to asylum of Article 18 Charter requires that the alien will enjoy appropriate status in the third state, and thus be treated in accordance with basic human rights standards (see paragraph 7.4.2).

The state contemplating expulsion to a third country does not have to determine refugee status or applicability of the prohibitions of *refoulement* in each and every case. It can to a certain extent trust that the third country does satisfy the conditions listed above. This trust does not necessarily rest on the third state's being a party to all instruments of international law concerned. The trust is justified if the third state has entered into comparable obligations. The more indications that the expelling state has that a third state in general abides with its own international law obligations, the firmer the trust is. But it must always allow for counter evidence from the part of the protection seeker (paragraph 7.4.3).

7.5 The exception of the safe third country in European law

Below, I will discuss how far the several modalities of the exception of the safe

third country that figure in European asylum law meet the requirements identified in the previous paragraph. For each of these modalities, I discuss first the requirements on the third country, and then the requirements on the assessment of its safety.

7.5.1 The Dublin Regulation and the Dublin Convention

Requirements on the third state

[520] The safety or otherwise of a (Member) state in the particular circumstances of an individual applicant's case does not figure among the criteria for determining responsibility under the Dublin Convention or the Dublin Regulation. According to the Preamble to the Dublin Regulation,

“The European Council [...] agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the [Refugee Convention], thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-*refoulement*. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-*refoulement*, are considered as safe countries for third-country nationals.”¹³⁶

Hence, by Regulation, all Member States are considered to be “safe” for the purpose of the prohibition of *refoulement*. Other aspects of safety are not explicitly addressed. But we may observe that the responsible Member State has the obligation to admit the applicant, and complete the examination of his request for protection.¹³⁷ This examination does not necessarily address the qualification of the applicant for refugee or subsidiary protection status, for any decision on the application constitutes “examination” for the purposes of the Dublin Regulation.¹³⁸ The examination may therefore address the decision to expel the alien to a safe third country pursuant to Articles 26 or 27 PD.

The Dublin Convention does not contain a similar statement, but requires that examination by the responsible Member State (in the terms of international asylum law, the “third country”) must be “in accordance with its national laws and its international obligations”.¹³⁹ As all states to which the Dublin Convention applies are party to the relevant instruments of international asylum law, the Dublin Convention requires observation of the prohibitions of *refoulement*. Under the Dublin Regulation, the examination is “in accordance with national law”;¹⁴⁰ accordance with international law is not explicitly required. That national law is, however, subject to relevant CEAS legislation that requires such compliance.

[521] Under both instruments, derogation from the obligation to examine can be made if the Member State can expel the applicant to a third country (not being a Member State or Iceland or Norway or Switzerland). Both instruments require that expulsion to third countries be in compliance with the Refugee Convention.¹⁴¹ Where the states bound by the Dublin Regulation are concerned, expulsion to third countries is further conditioned by the relevant arrangements of the Procedures Directive (discussed below).

Hence, the Dublin Convention and Regulation require observance of the prohibition of *refoulement*, and secure admission in the receiving Member State. The other international law requirements on the safety of the third country are not explicitly addressed (such as indirect *refoulement* and examination standards).

The assessment of the safety

[522] Rebuttal of the presumption that the other Member State is safe is not explicitly addressed in the Dublin Regulation. But expulsion to the responsible Member State is not obligatory; the Member State where the application was lodged may examine the application itself (and then becomes “responsible” for the purposes of the Dublin Regulation).¹⁴² Any decision not to examine a claim on the grounds that another Member State is responsible is hence also a decision not to take over this responsibility, which must be open to appeal before a court or tribunal.¹⁴³ The stating of conditions or requirements for taking over responsibility because the otherwise responsible Member State is not safe for the purposes of the safe third country exception is left to domestic law. Domestic legislation requiring examination if another Member State is unsafe for a particular applicant would not run counter to Preamble recital (2) (quoted above under number [520]) that states that Member States are safe, as that recital does not state that the presumption of safety cannot be rebutted.

The Dublin Convention has often been criticised because the assumption of safety of the third (member) state was based merely on the formal ground of that state’s being party to relevant instruments of international law, whereas performance under those instruments could (and did) significantly diverge (cf. number [507]). Apart from the (conditioned) requirement to examine the application, the Dublin Convention does not provide for additional guarantees on the safety of third states.

This is different from the Dublin Regulation. As far as the Common European Asylum System requires performance in accordance with international law, it does reinforce the assumption that the Member States are safe. Obviously, as to issues that are not addressed or regulated at a level falling

short of international law, the assumption of safety is open to rebuttal. Another relevant guarantee absent under the Dublin Convention is to be found in the Dublin Regulation itself: the opportunity to challenge the transfer decision, and eventually to request its suspension during such appeal proceedings.

7.5.2 The safe third country concept

Requirements on the third country

[523] Article 27 PD addresses the application of “the safe third country concept”.¹⁴⁴ This “concept” may be applied

“only where the competent authorities are satisfied that a person seeking asylum¹⁴⁵ will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
- (b) the principle of non-*refoulement* in accordance with the Geneva Convention is respected; and
- (c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and
- (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention”.¹⁴⁶

Thus, expulsion to the third country may not constitute direct *refoulement* in breach of Article 33(1) RC (the requirement under (a)), nor indirect *refoulement* contrary to the same provision or to the other prohibitions of *refoulement* (requirements (b) and (c)).¹⁴⁷ Somewhat surprisingly, it is not required that the expulsion to the third state does not constitute direct *refoulement* contrary to Articles 3 CAT, 7 CCPR or 3 ECHR. However, according to Article 27(2)(c) Member States are obliged to lay down this requirement in domestic law (see number [527]). The fourth requirement on “treatment” in the third country concerns the possibility to request “refugee status” and “receive protection in accordance with the” Refugee Convention. Read in conjunction with Article 27(1)(a) and (b) PD, this “protection” addresses the secondary rights laid down in the Refugee Convention.

Does the provision allow for expulsion to a third country that could in turn expel the applicant to a subsequent, fourth state? Arguably, it does. The prohibitions on indirect *refoulement* (Article 27(1)(b) and (c)) suppose so. Article

27(1)(d) PD requires “the possibility to request refugee status”, not, the opportunity to request it: the third country should run examination procedures, but it is not required that it should examine the refugee status of the applicant.¹⁴⁸

Finally, a remark should be made on the requirement in the first clause of Article 27(1) quoted above that (otherwise sufficient) protection *in*, not *by* the third country is required.¹⁴⁹ Should we assume that Article 27(1) PD allows for application in the case that some third party could offer protection in the third country? Article 27(3)(b) refers to the actor that will receive the applicant upon expulsion in the third country as “the authorities of the third country”. We saw above that the purpose of the latter provision is facilitating the applicant’s access to “protection” in the third country as meant under Article 27(1)(d) PD. That “protection” is therefore protection by “the authorities of the third country”, not by some third party. Arguably, protection “in” the third country means protection by that country on its territory.

[524] A further requirement follows from Article 27(4) that reads

“Where the third country does not permit the applicant for asylum in question to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II”.

Thus, the applicant should be admitted to the third country. If not, “access to a procedure” in accordance with Chapter II must be granted. As the Procedures Directive procedures apply only at the border or in the territory of the Member States¹⁵⁰ (and most Chapter II provisions presuppose such presence, cf. par. 6.2.4), this requirement implies a duty to re-admit the applicant for the purposes of examination.

Further, Article 27(2) provides that

“[t]he application of the safe third country concept shall be subject to rules laid down in national legislation, including [...] rules requiring a connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country”.¹⁵¹

Finally, Article 27(3) states two safeguards:

“When implementing a decision solely based on this Article, Member States shall:

- (a) inform the applicant accordingly; and
- (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance”.

As a motivated decision is required in all procedures wherein this provision may be applied,¹⁵² the requirement “to inform the applicant accordingly” specifically concerns the expulsion (“implementation of the decision”). The second requirement appears to serve as the applicant’s access to determination procedures in the receiving country (cf. Article 27(1)(d) PD).

[525] Article 27 PD explicitly addresses all requirements on the safety of the third country set by international law, except for the procedural standard that the third country should make a meaningful assessment of the claim. Arguably, this requirement is implicit in the demand that in the third country, the prohibitions of *refoulement* are to be “respected”.¹⁵³ The requirement that refugees could enjoy the secondary rights laid down in the Refugee Convention (cf. number [504]) is in excess of international law standards, but in compliance with Article 18 Charter. The requirement that the applicant have a previous “connection” with the third country is also in excess of international standards. Finally, the condition that applicants whose access to the third country is denied are taken back secures protection from “refugee in orbit” situations (see numbers [478] and [518]).

We should further observe that the future tense applied in Article 27(1) first clause and the present tense under (a) to (d) focus on the availability of protection in the present, after expulsion. Thus, an opportunity in the past to get protection in the third country is not relevant for its application.¹⁵⁴ In summary, the requirements on the safety of the third country are in line with relevant international law as well with the Charter.

The assessment of the safety

[526] On what grounds may the Member States assume that a third country fulfils these requirements? Article 27 does not explicitly require that the third country is party to relevant instruments of international law, in marked contrast to Article 35A(2)(a) and (c) PD (see number [532] below). Moreover, Article 27(1) speaks of being “treated in accordance with the following principles”, not of “observance” of “obligations” or provisions. Rather, the provision sets material standards: the prohibition of indirect *refoulement* should be “respected”, life and liberty not “threatened”, and refugees need not be “recognised”, but a person “found to be a refugee”¹⁵⁵ should “receive protection in accordance with” the Refugee Convention. Maybe we can deduce that stable practice of non-*refoulement* and of treatment in accordance with the standards set in the Refugee Convention after “recognition” by UNHCR could satisfy the requirement of Article 27(1)(d).

In summary, a third country cannot qualify as safe pursuant to Article 27 PD because of mere ratification of relevant instruments of international law; rather, it must meet material standards. In this respect, the provision requires a relatively firm basis for the assumption of safety. As far as third countries may be “safe” pursuant to those material standards although they did not accede to the relevant instruments of international law, the presumption of safe is prone to rebuttal (cf. number [516]).

[527] According to the Preamble to the Procedures Directive, the safe third country exception may apply only “where this particular applicant would be safe in the third country concerned”.¹⁵⁶ The possibility of rebuttal is addressed in Article 27(2)(b) and (c):

“[t]he application of the safe third country concept shall be subject to rules laid down in national legislation, including [...]

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case by case consideration of the safety of the country for a particular applicant and/or national designation of countries considered as being generally safe;

(c) rules, in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.”

Article 27(2)(b) requires that the Member States adopt some “methodology” for assessment of the safety of the third country. Against the background of the legislative history, the provision implies that Member States may use lists of states considered as safe, as well as do without lists and consider the safety in each particular case.¹⁵⁷ The second phrase is somewhat ambiguous where it speaks of “national designation of countries considered to be generally safe”. Read in opposition to the option offered in the first half of the clause, it means that in case of designation as a “generally safe” state, no “case by case” assessment is required. But “generally” might also indicate that a country may be designated as safe only “in general”, thus not for each and every particular case – which implies that notwithstanding the designation, the assumption should be open to rebuttal.

Arguably, the second reading is to be preferred as it accommodates Article

27(2)(c). This provision states that domestic rules must allow for individual examination of the safety of the third country for any particular applicant if international law requires it. It stipulates that at any rate domestic legislation must allow for rebuttal of any assumption of safety as to the risk of subjection to ill treatment as a result of expulsion.¹⁵⁸ The phrase “as a minimum” seems to acknowledge that international law (and hence Article 27(2)(c) PD) may also require the possibility of such rebuttal as to other requirements on the country’s safety.

Article 38(3) PD provides that

“Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with: [...] (c) the grounds of challenge to a decision under Article 25(2)(c) in accordance with the methodology applied under Article 27(2)(b) and (c).”

The provision acknowledges that international asylum law requires that application of the exception should be open to challenge on the grounds meant in Article 27(2)(c) PD, but leaves once again the modalities to domestic law.

[528] Thus, Article 27 PD appears to waver between the general and individual approach to assessment of safety (cf. paragraph 7.4.3.1). We may observe that Article 27(1) is couched in ambiguous terms. The competent authorities must be satisfied that the applicant “will be treated” in accordance with the discussed requirements, which phrase focuses on the predicament of the individual. But on the other hand the requirements are stated in an abstract kind of way. Thus, “the possibility to request refugee status” must exist, and it is not, therefore, required that the specific applicant will have the opportunity to request refugee status - for example, in case a previous application with the third country failed, or if the applicant can be expelled to a fourth “safe” state.

This ambiguity is reproduced in Article 27(2)(b), as we saw above. The Directive requires that domestic law provides for rebuttal of the assumption of safety for an individual applicant only where it comes to a risk of ill-treatment. There is no reason why the assumptions on the other requirements should not be open to rebuttal. In particular, there is no reasonable explanation why the assumption that the applicant will be safe from persecution as required by Article 33 RC would not be open to rebuttal on the same footing as safety from ill-treatment. As observed, the phrase “as a minimum” applied in Article 27(2)(c) shows awareness of, at least, the possibility that domestic law must offer the opportunity to rebut assumptions on the other aspects of the safety of the third state as well. But because of the absence of a requirement to offer this opportunity, the arrangement does not secure observance of relevant standards of international law.

7.5.3 The country of first asylum concept

Requirements on the third country

[529] Article 26 PD addresses a particular variant of the third country exception, the “country of first asylum”.¹⁵⁹ The exception may apply in two kinds of cases:

- “(a) [the applicant] has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection, or
- (b) [the applicant] enjoys otherwise sufficient protection in that country, including benefiting from the principle of non-*refoulement*, provided that he/she will be re-admitted to that country.”

What does the term “protection” entail? “That protection” (as meant under (a)) is protection accorded to recognised refugees – arguably, protection pursuant to Articles 2 to 34 RC, including protection from expulsion.¹⁶⁰ Article 26 under (b) speaks of “sufficient protection”, which implies that this protection may fall short of the standard set under (a);¹⁶¹ but at any rate, it includes protection from *refoulement*. Hence, in the first asylum state the applicant should be safe from indirect *refoulement*.

Remarkably, the Directive does not explicitly require that in the first country of asylum, the applicant’s life nor freedom is threatened on Convention grounds, nor that he runs no real risk of ill-treatment there. A reading of “(sufficient) protection” in accordance with relevant rules of international law, relevant general principles of Community law and Article 19 Charter requires protection from direct *refoulement*. According to the last clause of Article 26, Member States “*may* take into account the content of Article 27(1)” PD when applying the “concept” (emphasis added). As Article 26 PD is a minimum standard, the clause does not confer the competence to waive application of the concept in particular cases; rather, the phrase should be read as an incentive to apply the conditions of Article 27(1) to the safe country of origin exception (see number [674]).

Thus, Article 26 requires effective protection from indirect *refoulement*, admission to the third state, and, arguably, implies protection from direct *refoulement*. We should observe that the provision further requires explicitly that the protection be still available (or can still be enjoyed).

Assessment of the safety

[530] Article 26 PD does not explicitly address the way in which the safety of the third country should be assessed. Ratification of relevant treaties by the third country is not required, in contrast to the safe third neighbouring

countries meant in Article 35A PD (see below, number [532]). Arguably, by referring to recognition “in”, and not by, the first asylum country, the Directive allows for application to states that did not ratify the Refugee Convention, but that accord protection in accordance with that Convention after “recognition” by UNHCR (see also number [523]). Unlike Article 27 (the safe third country exception), Article 26 does not explicitly address whether rebuttal of the assumption that (otherwise sufficient) protection will be available should be allowed. Arguably, it follows from the phrases “considered to be a first country of asylum *for a particular applicant*” and “application of the concept *to the particular circumstances of an applicant*” that a case by case examination is required,¹⁶² and hence rebuttal must be allowed.

7.5.4 Member States as countries of first asylum

[531] Not only third countries, but also Member States may be “countries of first asylum”. Article 25(2)(a) PD implicitly states this where it allows for declaring a request inadmissible if a person has been recognised as a refugee in another Member State.

As in Article 26 PD, the question of whether expulsion to this country of first asylum may constitute direct *refoulement* is not addressed, and Article 25(2)(a) does not provide for rebuttal of the safety of the Member State for the refugee-applicant. This is in line with the statement in the Dublin Regulation that Member States are safe for the purposes of the prohibition of *refoulement* (cf. number [520]); nevertheless, it is remarkable, as the Spanish Protocol does allow this for applicants who are EU citizens (see above number [453]). A reading of Article 25(2)(a) in accordance with the prohibitions of *refoulement* and Articles 18 and 19 Charter requires that Member States do not make use of their competence to deny examination of the claim to such refugees. There is no provision on Member States as countries of first asylum for the category addressed in Article 26(b) PD, i.e. for persons enjoying subsidiary forms of protection.¹⁶³ But usually, the Member State that offered “sufficient protection” will be responsible under the Dublin Regulation.¹⁶⁴ Obviously, the same holds true for the refugee recognised by another Member State. For practical purposes, Article 25(2)(a) PD will have meaning only in case a Member State does not meet some time-limit set by the Dublin Regulation and is hence responsible for examining the request itself.

7.5.5 The safe third neighbouring country

Requirements on the third country

[532] Article 35A PD allows for expulsion of applicants who entered illegally without examination to the particular circumstances of the cases to a certain type of third country. For the purpose of this procedure, a country is safe only if

- “(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations; and
- (b) it has in place an asylum procedure prescribed by law; and
- (c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and it observes its provisions, including the standards relating to effective remedies [...]”.¹⁶⁵

Further, readmission to the third country is required.¹⁶⁶ The provision hence addresses most requirements set by international law on the safety of the third country: the prohibition on indirect *refoulement* (pursuant to the Refugee Convention and the European Convention of Human Rights), readmission, access to protection through an asylum procedure, and remedies against further *refoulement* by the third country must be effective for the purposes of the ECHR. The requirement that the applicant’s life or freedom is not threatened on Convention grounds (Article 33 RC) in the third country is not addressed, but follows implicitly from Article 35A(4) PD (see below, number [534]). The requirement to process the application in case the third country does not readmit the applicant provides for some protection from “refugee in orbit situations”. But it is not required that the third country will examine the refugee status of the applicant (cf. number [523]). Imminent chain expulsion to a fourth state therefore does not bar application of Article 35A PD.

Assessment of the safety

[533] The assumption that the third country is safe is based on both formal and material grounds: the country must have ratified both the Refugee Convention and the European Convention, and it must observe its obligations under these instruments. The organ deciding whether or not a third country meets these requirements is the Council, acting on a proposal by the Commission and after consultation with the European Parliament, and voting by qualified majority.¹⁶⁷ Hence, Member States that consider that a third country does not meet the requirements that are set out above can be overruled. Until adoption of a list of third countries by the Council, individual Member States may apply the Article 35A arrangement on the basis of domestic legislation to third coun-

tries, subject to two conditions.¹⁶⁸ First, the third country must be designated as safe on the basis of the conditions laid down in Article 35A(2)(a), (b) and (c); hence, the readmission requirement does not apply. Second, they may do so only if relevant legislation that designates neighbouring countries as safe was in force at the date of adoption of the Procedures Directive.

[534] The most striking aspect of the arrangement is obviously that it allows for expulsion without “examination of the asylum application and of the safety of the applicant in his/her particular circumstances”.¹⁶⁹ The Procedures Directive therefore does not require that the applicant could rebut the presumption of safety in his particular case. However, according to Article 35A(4) PD

“Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-*refoulement* under the Geneva Convention including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law”.

Thus, the arrangement of Article 35A(1) must be supplemented by an arrangement in domestic legislation that should meet two conditions. First, the domestic legislation must be “in accordance with” Article 33 RC. Second, it must provide for “exceptions from the implementation” of Article 35A(1) for (*inter alia*) “reasons of public international law”. As observed earlier, a proper reading of Article 33 RC and of other relevant public international law implies that an individual examination should take place if the applicant manages to *prima facie* rebut the assumption of safety. However, Article 35A does not require that the applicant can “challenge the application of the safe third country concept on the grounds that he/she would be subjected to” ill treatment, or treatment contrary to Article 33 RC, as Article 27(2)(c) PD does (cf, number [527] above). We may further observe that Article 35A(4) seems able to accommodate the German arrangement on safe neighbouring third countries, which does not allow for rebuttal on grounds that lie within the scope of the assessment of the safety by the competent authority.¹⁷⁰ Thus, though allowing for rebuttal in cases where the applicant risks capital punishment, or because the third state’s performance under the relevant instruments of international law has changed radically since the safety was assessed,¹⁷¹ divergent interpretation or application of the Refugee Convention would not constitute a ground for rebuttal

In summary, Article 35A(4) acknowledges that international law may set

obstacles to application of Article 35A(1), and requires that domestic law should provide for proper arrangements. But it does not require that domestic law should provide for the opportunity to challenge expulsion on the grounds that the country is not safe in his particular circumstances.

[535] Article 35A therefore allows for expulsion to a third country, not being a Member State, without any examination of the claim. This denial of any individual examination is denial of protection under the prohibitions of (direct as well as indirect) *refoulement*, and hence at variance with international law. The feature distinguishing applicants addressed by Article 35A from those addressed by the other procedures is their (attempt at) illegal entry. We should observe in this context that Article 31 RC explicitly acknowledges that illegal entry from a third country may offer grounds for measures like detention, but does not remove the “refugee” from the scope of protection of Article 33 RC. Likewise, liability under Article 3 ECHR as well as the other prohibitions of *refoulement* is not affected by illegal entry. The arrangement in Article 35A therefore constitutes a gap in the protection system established by European asylum law.

We should not, however, overestimate the size of this gap. First, application of the arrangement is subject to territorial restrictions. The safe third neighbouring country procedure can be applied only in Member States bordering designated safe third countries, and only after entry from the third country, hence not after Dublin transfers (see number [383]). Second, we should observe that the arrangement applies only to applicants who entered or are entering illegally. The procedure cannot apply to persons who instead report themselves at the border to the competent authority. Although they are not authorised to enter, their applications must then be processed in accordance with the ‘normal procedure’, the ‘border procedure’ or the ‘special border procedure’ (see par. 6.2.3). These procedures would entitle them *inter alia* to an individual examination of their claim, and the right to remain until a decision has been reached. In such procedures, the competent authority may consider expulsion to the same neighbouring non-Member State pursuant to Article 27 PD, but this arrangement allows for rebuttal of assumption of the safety on at least certain grounds (number [527] above).

Still, the opportunity to report to competent authorities before transgressing the border may not be open to each and every refugee (or person otherwise in need of international protection), for example, in cases where they had had to take recourse to travel agents who brought them illegally into the European Union. There is no justification under international law for applica-

tion of the safe neighbouring third country procedure to such refugees or persons otherwise in need of international protection.

7.5.6 Concluding remarks

[536] The way European asylum law reflects requirements of international asylum law on the safety of the third country and on the application of the exception are summarised in the following scheme:

Scheme 2 – The safe third country concept

	requirements on the third state						grounds for presumption safety		generic or individual approach	
	<i>refoulement</i> prohibited	indirect <i>refoulement</i> prohibited	access to territory	access to asylum or procedure	basic human rights	previous presence	Party to treaties	state practice	individual assessment	rebuttal possible
EEA State (DR/DC)	yes ¹	yes ¹	yes ²	yes ²	yes ¹	no	yes ¹	yes ¹	no	yes ³
safe country of first asylum (Art. 26 PD)	yes	yes	yes	yes	yes/ no ⁴	yes	no	no	yes	yes
safe third country (Art. 27 PD)	yes	yes	yes	yes	yes	yes	no	yes	yes	partially ⁵
safe third neighbour (Art. 35A PD)	yes	yes	yes	yes	yes	yes	yes	yes	no	no

¹ Relevant requirements are not explicitly stated, but (partially) satisfied through other European asylum law.

² Article 16(1) DR.

³ Article 19(2)/20(1)(e) DR.

⁴ Required by Article 26(a), not by Article 26(b) PD

⁵ Only as to indirect *refoulement* (Article 27(2)(c) PD).

As to the requirements on the safety of the third country, the several arrangements do not diverge very much. As to the grounds for regarding a country as safe, we should observe that Articles 26 and 27 PD both allow for expulsion to third states that are not formally bound to any of the relevant instruments of international law. As argued under number [516], the presumption of safety of such countries would have a rather weak basis.

Most interesting from the point of view of international law are the rules on the possibility for rebuttal of the presumption of safety. We saw in paragraph 7.4.3.1 that two extreme positions are possible: the individual and the generic approach. In the individual approach, the safety of a state has to be assessed for each applicant separately. According to the generic approach, a country may be deemed safe on the basis of certain parameters. It was argued that the generic approach is compatible with international law if the grounds for assuming a third country is safe are sound, and if the presumption of safety can be challenged because of the particular circumstances of the applicant.

[537] It appears that the Dublin Regulation relies on the “generic approach”: Member States should be deemed to be safe, and hence no assessment of safety in the particular circumstances of the case is required. Obviously, as all Member States are party to the relevant instruments of international law, and as Community legislation binds them to observe certain minimum standards when interpreting and applying those instruments, this presumption of safety is justified to a considerable extent. As far as European asylum law does not harmonise relevant asylum law, the presumption may further be justified by the practice of the Member State concerned. Importantly, the Dublin Regulation explicitly requires that applicants can challenge the decision to expel them to another Member State. But the instrument does not address the question of whether and if so, on what grounds derived from international asylum law the decision to expel may be challenged, and hence leaves this matter to domestic law. Thus, the Dublin Regulation allows for both the generic approach as a rebuttable presumption, as well as for the generic approach in absolute form, i.e. for domestic legislation prohibiting rebuttal of the presumption of safety of the other Member State.

The grounds for considering a state a country of first asylum are concerned with a particular applicant’s ties with or position in that particular state. Hence, in terms of the nature of the assessment, the individual approach applies to the country of first asylum concept. But it does not follow that the presumption that such a country of first asylum is safe (or that it effectively provides for ‘asylum’) is open to rebuttal. Article 26 PD (non-Member States

as countries of first asylum) implies the possibility of rebuttal; Article 25(2)(a) (Member States as countries of first asylum) does not address the matter.

Article 27 (non-Member States as safe third countries) requires that domestic legislation offer the applicant the opportunity to rebut the assumption that he will not as a consequence of the expulsion be subjected to ill treatment. As to other aspects of the safety of the third country, Article 27 does not make a choice between the generic in the absolute and the rebuttable form of the generic approach. Rather, it leaves the choice to the Member States. The Procedures Directive therefore allows Member States to exempt other aspects of the third country's safety from rebuttal. This would be contrary to international law. In particular, there is no reasonable explanation why the presumption that the third country complies with the prohibition on expulsion leading to ill-treatment should be open to rebuttal, but the prohibition on expulsion ex Article 33 RC should not.

[538] Like the Dublin arrangement and the safe third country concept in Article 27 (non-Member States as safe third countries), the safe third neighbour country exception ex Article 35A PD leaves the possibility of rebuttal of the presumption of safety on grounds derived from international law to domestic legislation. It requires that relevant domestic legislation provides for "exceptions from the application" of the arrangement "for reasons of public international law", but does not require that domestic law offers the opportunity to challenge expulsion pursuant to Article 35A on the grounds that this would entail direct or indirect *refoulement*. In theory, Member States could apply the generic approach to neighbouring safe third countries as both an absolute and a rebuttable presumption. In fact, the stipulation that "no, or no full examination" of the application and the applicant's safety "in his/her particular circumstances" need take place, and the exemption from any meaningful safeguard, strongly suppose the generic approach in absolute form.

We should observe that the generic assessment of safety of third countries pursuant to Articles 27 and 35A fits in awkwardly with the Procedure Directive's requirements on remedies (cf. paragraph 6.3). According to Article 38(1) PD, the remedy against decisions based on these provisions must be "effective", that is, the appeal authority should perform an independent and rigorous scrutiny of the individual's claim (cf. number [412]). Hence, where Articles 27 and 35A do not require an examination of individual circumstances in the first instance, such examination must take place in appeal proceedings. Where Article 35A allows for expulsion during the procedure at first instance, the remedy against the decision to apply this procedure may require that expul-

sion is suspended until the outcome of the appeal procedure. Obviously, all these requirements apply only to applicants who raised “arguable claims” (or the equivalent standard under Article 33 RC). But it can not be stated in the abstract that a claim cannot be arguable because a person has entered the European Union from safe third countries as meant in Article 27 or illegally from safe third neighbouring countries as meant in Article 35A. Therefore, national legislation should ensure that applications are at any rate not dismissed on the basis of Article 25(2)(c) read in conjunction with 27 or Article 35A PD if the applicant has an arguable claim under Article 3 ECHR or 33 RC.

[539] On what grounds is the particularly strong presumption of safety of safe third neighbouring countries’ meant in Article 35A PD based? Unlike other third states as meant in Article 27 PD, the safe neighbouring third states must have ratified both the Refugee Convention and the European Convention of Human Rights. Further, they must be designated by the Council as “safe”. The safe neighbouring third country arrangement therefore expresses the same approach to testing the safety of the third country as the Dublin arrangements. But Article 35A PD lacks an important safeguard, present in both the Dublin Convention and the Dublin Regulation: the obligation of the “responsible”, receiving state to examine the claim for protection (not to mention the safeguards provided for by other European asylum law in case of expulsion based on the Dublin Regulation). European asylum law hence allows for expulsion to a safe third neighbour country that will expel the refugee without any further examination to a fourth country - or to the first, persecuting country. Furthermore, unlike Article 35A, the Dublin Regulation does not propose application of the presumption of safety in absolute form to Member States – although the latter provide far more solid grounds for this presumption than a third country meeting the criteria of Article 35A PD. And we should observe, finally, that even the presumption that Member States are safe countries of origin is not absolute, pursuant to the Spanish Protocol (cf. number [462]). In summary, the approach to assessment of safety of neighbouring third countries pursuant to Article 35A is not only flawed from the point of view of international law, it also lacks justification when placed in the context of other European asylum law.

[540] Finally, a remark should be made on how the various arrangements on safe third countries fit in into the “right to asylum” as established in Article 18 Charter. This right entails a claim to a durable solution and to a status that is ‘appropriate’ (number [504]).

The Dublin Regulation “seeks to secure full observance of the right to asylum guaranteed by Article 18” of the Charter.¹⁷² It does so by requiring that each application that is lodged in the European Union be examined by one of the Member States. Expulsion to another (responsible) Member State is without prejudice to this statement. For such expulsion may qualify as application of the exception of the safe third country from the perspective of international asylum law. From the perspective of European asylum law it does not, as the expulsion does not prejudge the applicant’s qualification for a CEAS protection status. If the responsible Member State does not expel the applicant to a safe non-Member State, it must determine whether the applicant qualifies for refugee status according to Article 29 PD (cf. number [250]). If the alien does qualify, he is entitled to refugee or subsidiary protection status and to the secondary rights set out in Chapter VII pursuant to Article 13 or 18 QD. In this, Article 3(1) DR read in conjunction with Articles 29 PD and 13 or 18 QD does guarantee the right to asylum.

Arguably, Article 18 Charter has some further consequences for application of the safe third country exception. Articles 26, 27 and 35A PD all require either a previously established protection, or asylum procedures and observance of the prohibition of *refoulement* in the receiving state; and all three provisions require examination of the claim if the refugee is not admitted to the third country. So far, they guarantee access to a durable solution. As observed above, Article 27 and 35A do not require that it be established that the individual refugee has the opportunity to request for and thus receive asylum in the third state. Nevertheless, we may observe that the refugee’s right to asylum is recognised, and the possibility of getting asylum functions as a condition on expulsion. But a similar requirement also follows from the prohibitions of *refoulement* and hence from Article 19(2) Charter. Hence, the requirement that a durable solution be available need not be ascribed to Article 18 Charter. However, Articles 26, 27 and 35A also require that the alien could invoke “protection” in accordance with the Refugee Convention (Articles 26(a), 27 and 35A). It was argued that this “protection” entails entitlement to Refugee Convention benefits (or “sufficient” benefits – see numbers [529], [504] and [532]). Hence, the other requirement implied by Article 18 Charter is addressed as well. But only partially, for Articles 27 and 35A PD allow for expulsion to a third country that may in turn expel the applicant to a fourth country. Hence, the prospect of a durable solution and appropriate status in the third or a subsequent state is not stated as a condition on expulsion.

NOTES

- ¹ Preamble recital (22) PD.
- ² That is, apart from other concepts that come close to the safe third country exception: exclusion from refugee status because a UN agency offers protection, or the person is treated by the country where he resides as if he were one of its nationals (Article 12(1) QD, based Articles 1D and 1E RC), and the concept of internal protection (Article 8 QD, see number [344]). I leave them out of account here because they function in a different context: consideration of these alternative sources of protection does not precede status determination, but forms part of it. But we should observe that the conditions for application of the internal protection exception are very close to those for application of the exception of the safe third country (see number [445] above).
- ³ The restriction of the scope of application of Articles 26 and 27 to non-Member States is laid down in Article 25(2)(b) and (c) PD.
- ⁴ Noll 2000, p. 184.
- ⁵ See for the Dublin Convention and the other mentioned agreements numbers [43] and [203].
- ⁶ See number [265].
- ⁷ Article 1(b) DC.
- ⁸ Article 3(1) *jo* 2(c) DR.
- ⁹ See number [263] above.
- ¹⁰ Preamble recital (5) DR.
- ¹¹ Preamble recital (1) DR, cf. Article 61(a) TEC, cf. number [253] above; the Preamble to the Dublin Convention refers to the objective of an “*area without internal frontiers in which the free movement of persons shall, in particular, be ensured*”.
- ¹² *Explanatory memorandum to Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, COM(2001)447final, OJ [2001] C304E/192.
- ¹³ Cf. Noll 2000, p. 186; Brandl 2004, p. 35.
- ¹⁴ Preamble recital (4) DR.
- ¹⁵ Preamble recital (15) DR.
- ¹⁶ Preamble DC, second and fourth recital.
- ¹⁷ Preamble recital (4) DR. The Dublin Convention should “*avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications*” (fourth Preamble recital DC).
- ¹⁸ Preamble recital (8) DR.
- ¹⁹ Cf. Article 4(1) DR.
- ²⁰ Articles 4(4) DR and 12 DC.
- ²¹ Art. 4(5) DR.

- ²² Article 5(1) DR.
- ²³ Cf. Article 4 DC.
- ²⁴ Cf. Preamble recital (6) DR.
- ²⁵ *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (COM/2001/447 final), *OJ* [2001] C304E/192-201, Commentary to Articles, p. 14.
- ²⁶ Article 9 DR, cf. Article 5 DC.
- ²⁷ Article 10(1) DR; cf. Article 6 DC, which does not provide for cessation of responsibility after 12 months of absence.
- ²⁸ Article 10(2) DR, which further specifies that if the applicant lived in several Member States for more than five months, responsible is the state where he most recently did so. Cf. Article 13 DC.
- ²⁹ Article 11 DR, cf. Article 7(1) DC.
- ³⁰ Article 12 DR, cf. Article 7(2) DC.
- ³¹ Article 13 DR, cf. Article 8 DC.
- ³² Article 16(3) DR, cf. Article 10(3) DC.
- ³³ Article 16(2) DR, cf. Article 10(2) DC.
- ³⁴ Cf. Article 3(4) DC.
- ³⁵ Cf. Article 9 DC.
- ³⁶ Articles 4 till 8 DC, referred to in the preceding footnotes.
- ³⁷ Noll 2000, pp. 316-325.
- ³⁸ This objective is stated in Article 63(2)(b) TEC, and Preamble recital (20) TPD.
- ³⁹ Article 24 TPD.
- ⁴⁰ Article 25(1) TPD.
- ⁴¹ Article 25(1) TPD.
- ⁴² Article 26 TPD.
- ⁴³ In principle, because a request for temporary protection is not an “application for asylum” as meant in Article 2(d) DR if such protection can be applied for separately, and the applicant explicitly requested for it (Article 2(c) DR; cf. number [263] above).
- ⁴⁴ Article 27(2)(a) PD.
- ⁴⁵ Articles 27(4) and 35A(6) PD.
- ⁴⁶ Articles 7 and 8 DR. Family members and relatives can be brought together on “humanitarian grounds” only, if the persons concerned “consent” (Article 15(1) DR, see number [616]).
- ⁴⁷ The reader is referred to work in progress on readmission agreements, concluded by the Community, by Nils Coleman.
- ⁴⁸ Commission Dublin Working Paper, pars. 14-20; cf. Noll 2000, pp. 194-5.
- ⁴⁹ Preamble recital (11) DR.
- ⁵⁰ Articles 4 (5) and 16(1)(c), (d) and (e) DR, and 3(7) and 10(1) (1)(c), (d) and (e) DC.

- ⁵¹ Article 17(2) DR.
- ⁵² Article 17(1) DR.
- ⁵³ Article 17(1) second clause DR.
- ⁵⁴ Article 11(1) DC.
- ⁵⁵ Article 18(1) DR.
- ⁵⁶ Article 18(6) DR.
- ⁵⁷ Article 18(7) DR.
- ⁵⁸ Article 13(4) DC.
- ⁵⁹ Article 19(3) and (4) DR. The time limit may be extended to twelve or eighteen months if the applicant is held in detention or absconded.
- ⁶⁰ Article 13(5) DC.
- ⁶¹ After three months of absence of the applicant, its obligation to take him back ceases – Article 16(3) DR (cf. number [482]).
- ⁶² Article 20(1)(b) DR.
- ⁶³ Article 20(1)(d) DR.
- ⁶⁴ Article 20(1)(c) and (2) DR.
- ⁶⁵ Article 13(1)(b) DC.
- ⁶⁶ Article 18(5) DR.
- ⁶⁷ Cf. Articles 10(1) and 17(3) DR. The lists of elements of proof and circumstantial evidence announced in Article 18(3) DR are provided for in Annex II to the Dublin Application Regulation.
- ⁶⁸ Annex II lists AI.1 second indent and BI.1 second indent DAR.
- ⁶⁹ Article 21(1) DR.
- ⁷⁰ Article 21(2) DR.
- ⁷¹ Article 21(3) DR.
- ⁷² This is confirmed by a reading of Article 33 in conjunction with Article 32 RC, which prohibits expulsion *tout court* of recognised lawfully present refugees.
- ⁷³ That the protection of Article 33 RC is not limited to expulsion to the refugee's country of nationality (or of habitual residence) follows from the plural "territories"- Lauterpacht & Bethlehem 2003, p. 122.
- ⁷⁴ As to Article 33 RC, this follows from the phrase "in any manner whatsoever" (cf. BVerfG 14 May 1996, *BVerfGE* 94, 49, at pp. 92f (*Sichere Drittstaaten*); Grahl-Madsen 1972, p. 228; Spijkerboer & Vermeulen 2005, pp. 92-94; Zwaan 2003, pp. 17-22); as to Article 3 ECHR, the European Court of Human Rights stated so (ECtHR 7 March 2000, *Rep.* 2000-III (decision) (*T.I. v. UK*), under "*The Law – Concerning Article 3 – The Court's assessment – 1. The responsibility of the United Kingdom*"); as to Article 3 CAT, it follows from the term "*another state*" (cf. *General comment on the implementation of Article 3 of the Convention in the context of Article 22*, 21/11/97, CaT General comment 1, under 2); as to Article 7 CCPR, the Human Rights Committee never explicitly addressed the matter, but

arguably, the European Court's reasoning in *T.I. v. UK* is equally applicable (and see Zwaan 2003, pp. 39-40).

- ⁷⁵ See on the burden of proof for the application of the exception of the safe third country under number [510].
- ⁷⁶ Cf. Zwaan 2003, pp. 22; Goodwin-Gill 1998, p. 343; Boeles 1997, p. 69; Spijkerboer & Vermeulen 1995, p. 284.
- ⁷⁷ Spijkerboer & Vermeulen 1995, pp. 284-285.
- ⁷⁸ ECtHR 7 March 2000, *Rep.* 2000-III (decision) (*T.I. v. UK*), under *The position of the applicant as a failed asylum seeker in Germany*.
- ⁷⁹ This concerned extradition of Jens Soering by the UK to the USA. Soering would be tried in Virginia for murder and could be sentenced to death; his placement on "death row" would constitute ill-treatment as prohibited by Article 3 ECHR. The UK government had certified that it would request the court in Virginia not to impose the death penalty. The European Court of Human Rights decided that it was not confident this "undertaking" would be "effective", as it had never been put to the test (ECtHR 7 July 1989, Ser. A vol. 161 (*Soering v. United Kingdom*), par. 97). But apparently such an "undertaking" could, if its effectiveness had been proved in the past, be a safeguard against the risk of ill treatment. Indeed in ECtHR (Grand Chamber) 4 February 2005, Appl. No. 46827/99 and 46951/99 (*Mamatkulov II*) (as well as in *Mamatkulov I*, ECtHR (First Section) 6 February 2003, Appl. No. 46827/99 and 46951/99), a material consideration that the expulsion from Turkey to Uzbekistan was not contrary to Article 3 ECHR concerned "assurances" from the Uzbek to the Turkish government that the expellees would not be tortured (*Mamatkulov II*, par. 76; *Mamatkulov I*, par. 75).
- ⁸⁰ See number [296].
- ⁸¹ Arguably, the Committee against Torture adopts a similar approach as to Article 3 CAT in CaT 16 November 1998, CAT/C/21/D/88/1997 (*Korban v. Sweden*). In par. 6.5, the Committee against Torture observed in its assessment of the risk of *refoulement* by a third country that the marriage of the protection seeker to a national of the third country would not guarantee a residence permit, thus implying that a residence permit because of the marriage would have been relevant for assessing the risk.
- ⁸² Why the burden of proof that the third state is safe rests on the second state, and not the applicant, will be addressed below, in number [510].
- ⁸³ Marx 1996, pp. 427-428. Spijkerboer & Vermeulen 1995, p. 289f, and Vermeulen & Zwaan 1997, p. 150 mention the same requirement, observing that it is also met with if a safe third country arrangement employed by the receiving, third state secures that status determination will take place in the fourth (or a fifth, et cetera) state.
- ⁸⁴ ExCom Conclusion No. 85 (XLIX), under (f).
- ⁸⁵ In Article 14 UDHR the phrase has a different meaning - cf. number [11] above.
- ⁸⁶ ECtHR 7 March 2000, *Rep.* 2000-III (decision) (*T.I. v. UK*), under *The position of the applicant as a failed asylum seeker in Germany*.

⁸⁷ Zwaan 2003, pp. 20-21.

⁸⁸ ECtHR 25 June 1996, *Rep.* 1996-III (*Amuur v. France*), par. 48. – The issue was not addressed in *T.I. v UK*; the Dublin Convention secured T.I.’s access to the third state. Likewise, in both cases on indirect *refoulement* thus far considered by the Committee against Torture, the applicants did have access to a third state (*Korban v. Sweden* and CaT 11 November 2003, CAT/C/31/D/153/2000 (*Z.T. v. Australia*). In the latter case, the Committee did not get to an assessment of the safety of the third state; see below number [513]).

⁸⁹ *Amuur v. France*, par. 48.

⁹⁰ ExCom Conclusion No. 85 (XIXL) 1998 under (aa).

⁹¹ ExCom Conclusion No. 58 (XL) 1989, under (f) speaks of treatment “in accordance with recognised basic human standards”; see Spijkerboer & Vermeulen 1995, pp. 230-1.

⁹² Legomsky 2003, p. 60f; Spijkerboer & Vermeulen 1995, pp. 234-236.

⁹³ Cf. Legomsky 2003, *l.c.*.

⁹⁴ Preamble RC, second indent.

⁹⁵ That is, if the third state is a Contracting state; if not, it cannot violate the Convention.

⁹⁶ The notion of “persecution” as applied in Article 1A(2) RC encompasses a broader range of human rights violations than “life or freedom”, mentioned in Article 33(1) RC. A literal reading therefore suggests that Article 33(1) has a narrower scope in this respect than Article 1A(2) RC (cf. the US Supreme Court, 480 US 421 (*INS v. Cardoza-Fonseca*)). Lauterpacht and Bethlehem state that object and purpose as well as context suggest that the threats which preclude *refoulement* and the threats meant in Article 1A(2) RC should be equated, and the *travaux préparatoires* confirm this view. A more explicit equation is absent in order to avoid the impression that the prohibition of *refoulement* is restricted to the country of origin (Lauterpacht & Bethlehem 2003, pp. 123-126).

⁹⁷ Spijkerboer & Vermeulen 1995, p. 285.

⁹⁸ It should be noted that even if this were different, it would be very hard to bar expulsion on the basis of the Refugee Convention provisions on secondary rights, as most of them do not set an absolute, but a relative standard, that is, require states to treat refugees as aliens generally, as nationals and so on (see number [542]).

⁹⁹ ExCom Conclusion No. 15 (XXX) 1979, h (iv).

¹⁰⁰ Article 1, Additional paragraph: “Asylum should not be refused by a Contracting state solely on the ground that it could be sought from another State. However, where it appears that a person requesting asylum from a Contracting state already has a connection or close links with another State, the Contracting state may, if it appears fair and reasonable, require him first to request asylum from that State” (UN doc A/CONF.78/12, reproduced in Goodwin-Gill 1996, p. 510; see on the failed Convention *o.c.*, pp. 179f).

¹⁰¹ The provision was considered at a UN Conference on Territorial Asylum by the Committee of the Whole and transmitted to the Drafting Committee, but not adopted by the Conference

as such – let alone by a plenary Conference of plenipotentiaries (Grahl-Madsen 1980, p. 61).

¹⁰² See Zwaan 2003, pp. 22f for references.

¹⁰³ Cf. Zwaan 2003, pp. 22-29, with references to the *travaux préparatoires*; Goodwin-Gill 2003, pp. 194, 203f, 218, with ample references to state practice as well.

¹⁰⁴ Zwaan 2003, p. 28.

¹⁰⁵ Cf. Zwaan 2003, pp. 22-29, with references to the *travaux préparatoires*.

¹⁰⁶ The labels of “generic” and “individual” approach are borrowed from Noll 2001a.

¹⁰⁷ The assumption that a third state is safe may further be founded on other factors than obligations under international law. Those other factors will be discussed below (in paragraph 7.4.3).

¹⁰⁸ E.g. in Noll 2001a p. 161f, Zwaan 2003, pp. 50-51, Terlouw 2000, pp. 12-13.

¹⁰⁹ Noll 2000, pp. 499-500.

¹¹⁰ House of Lords 19 December 2000 (*R. v. Secretary of State for the Home Dept., ex parte Adan and Aitseguer*), reproduced in *IJRL* Vol. 13 [2001], pp. 202-30.

¹¹¹ CaT 16 November 1998, CAT/C/21/D/88/1997 (*Korban v. Sweden*), pars. 6.5 and 7.

¹¹² ECtHR 7 March 2000, *Rep.* 2000-III (decision) (*T.I. v. UK*), under *The Law, Concerning Article 3 of the Convention, The Court’s assessment, 3. The position of the applicant as a failed asylum seeker if returned to Germany*.

¹¹³ See Spijkerboer & Vermeulen 1995, pp. 287ff.

¹¹⁴ Noll 2001, pp. 161ff; Baudoin et al. 2001, p. 128; Zwaan 2003, pp. 50-51.

¹¹⁵ *T.I. v. UK*, The Court’s Assessment, 1. *The responsibility of the United Kingdom*, fourth par., second clause.

¹¹⁶ ECtHR 25 June 1996, *Rep.* 1996-III (*Amuur v. France*), par. 48.

¹¹⁷ ECmHR 7 March 1991, Appl. No. 17518/90 (*Gezici v. Switzerland*); see Zwaan 2003, pp. 46-48 for further references to the case law of the Commission on the subject.

¹¹⁸ Zwaan 2003, p. 51 and cf. ECtHR (First Section) 6 February 2003, Appl. No. 46827/99 and 46951/99 (*Mamatkulov I*), where “even serious concerns” fall short of substantial grounds of a real risk (par. 72).

¹¹⁹ CaT 16 November 1998, CAT/C/21/D/88/1997 (*Korban v. Sweden*), par. 6.4; CaT 11 November 2003, CAT/C/31/D/153/2000 (*Z.T. v. Australia*), par. 6.1.

¹²⁰ *Korban v. Sweden*, par. 6.5. In *Z.T. v. Australia* the Committee against Torture did not address the safety of the third state: as *Z.T.* had not “presented sufficient evidence to convince it [the Committee, HB] that he would face a personal risk of being subjected to torture in the event of his return to Algeria” (par. 6.4), the assessment had come to an end after the first step.

¹²¹ Cf. *Korban v. Sweden*, par. 6.5 and *Z.T. v. Australia*, par. 6.4.

¹²² *Korban v. Sweden*, par. 7: “Furthermore, the Committee notes that although Jordan is a party to the Convention, it has not made the declaration under article 22. As a result, the

author would not have the possibility of submitting a new communication to the Committee if he was threatened with deportation from Jordan to Iraq.”

¹²³ Hailbronner 2000, p. 383.

¹²⁴ ECtHR 25 June 1996, *Rep.* 1996-III (*Amuur v. France*), par. 48, quoted under number [501].
¹²⁵ Cf. Spijkerboer & Vermeulen 1995, pp. 287-288 with references.

¹²⁶ Readmission agreements fall outside the scope of this study; the reader is referred to work in progress on readmission agreements, concluded by the Community, by Nils Coleman.

¹²⁷ Legomsky 2003, p. 76.

¹²⁸ In BVerfG 14 May 1996, BverfGE 94, 49 (*Sichere Drittstaaten*), at p. 111 the German Constitutional Court stated that Hungary could be considered a safe third country as far as the requirement of access to an examination procedure was concerned. At the time, Hungary’s obligations under the Refugee Convention were subject to the geographical limitation (see number [13]), and hence persons fleeing events outside Europe had no access to its refugee status determination procedure. But as Hungary had an “informal” understanding with UNHCR that persons from outside Europe whose refugee status had been assessed by UNHCR would get some sort of residence permit, it offered protection for the full range of Convention refugees to whom Germany was bound to offer protection from *refoulement*. Hence, reliance on UNHCR could according to the German Constitutional Court take the place of ratification of the Refugee Convention. Incidentally, Hungary revoked the territorial limitation in 1998.

¹²⁹ ECtHR 7 March 2000, *Rep.* 2000-III (decision) (*T.I. v. UK*), *Concerning Article 3 of the Convention – Submissions before the Court – The United Kingdom Government*. In its decision of 7 March 1991, Appl. No. 17518/90 (*Gezici v. Switzerland*), the European Commission of Human Rights indeed explicitly addressed the possibility of appeal to it in both the third country as well in the first country.

¹³⁰ Article 39(1): “*The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties or of the interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.*”

¹³¹ ECtHR (First Section) 6 February 2003, Appl. No. 46827/99 and 46951/99 (*Mamatkulov I*), par. 110, confirmed by the Grand Chamber ruling ECtHR 4 February 2005, Appl. No. 46827/99 and 46951/99 (*Mamatkulov II*), par. 129.

¹³² Vermeulen 2000, under (4).₂

¹³³ ECtHR 7 December 1976, Ser. A vol. 24 (*Handyside v. UK*), par. 48; ECtHR 18 December 1996, *Rep.* 1996-VI (*Aksoy v. Turkey*), par. 51; see also Verdussen 2000, pp. 45-50.

¹³⁴ Vermeulen 2000, under (4).₂

¹³⁵ CaT 16 November 1998, CAT/C/21/D/88/1997 (*Korban v. Sweden*), par. 7; cf. Zwaan 2003, p. 43.

¹³⁶ Preamble recital (2) DR.

¹³⁷ Article 16(1) DR.

¹³⁸ Article 2(e) DR, see number [373].

¹³⁹ Article 3(3) DC.

¹⁴⁰ Article 2(e) DR.

¹⁴¹ Articles 3(3) DR and 3(5) DC.

¹⁴² Article 3(2) DR.

¹⁴³ Articles 19 and 20 DR.

¹⁴⁴ The “concept” referred to, is inadmissibility of an application (hence waiving assessment of the merits of the claim) as the applicant can, in conformity with relevant rules of international law, be expelled to a safe third country (cf. Proposal PD, Comment on Article 21, p. 19).

¹⁴⁵ It may seem that this term implies a wider personal scope than “applicant” or “applicant for asylum” as defined in Article 2(c) PD would have done (cf. number [262]), but it follows from Article 27(4) PD that “applicant for asylum” is meant.

¹⁴⁶ Article 27(1) PD.

¹⁴⁷ Oddly, whereas the provision meticulously makes mention of freedom from “cruel” treatment (mentioned in Article 7 CCPR, see number [295] above), it does not speak of “inhuman or degrading punishment”. A reading in conjunction with Article 27(2)(c) PD arguably implies that this is just an error. As the prohibition on expulsion ex Article 3 ECHR and Article 7 CCPR does encompass inhuman or degrading punishment, the prohibition on indirect *refoulement*, arguably, likewise encompasses it. As in practice the ill-treatment risked in the third, or fourth country is not further defined, we may assume that Article 27(1)(c) addresses expulsion to a fourth country contrary to the prohibitions on inhuman or degrading punishment as well.

¹⁴⁸ The circumstance that the relevant Preamble recital (23) PD speaks of “protection in” the third country does not lead to another conclusion. The term “protection” is sufficiently broad to encompass protection from (indirect) *refoulement*.

¹⁴⁹ The phrasing can be traced back to the London Resolution on Host Third Countries, par. 2(c): “*It must [...] be the case that the applicant has already been granted protection in the third country or has had the opportunity, at the border or within the territory of the third country, to make contact with that country’s authorities and seek their protection [...; emphasis added, HB]*”. (Van Krieken 2000, p. 184).

¹⁵⁰ Article 3(1) PD.

¹⁵¹ We may observe that it is not required that the relevant domestic rules should be “in accordance with international law” as those meant under 27(2)(c) should be; and indeed, international law does not require such a connection.

¹⁵² In the ‘normal procedure’ and the ‘normal border procedure’ pursuant to Article 8 PD, and in the ‘special border procedure’ pursuant to Article 35(3) last clause (see par. 6.2.4). The provision cannot be applied on the basis of assessment in the preliminary procedure – an expulsion upon that procedure is based on the previous decision.

- ¹⁵³ Article 27(1)(b) PD.
- ¹⁵⁴ This is in contrast to the *Resolution on a Harmonized Approach to Questions concerning Host Third Countries* (London, 30 November and 1 December 1992, cf. number [44]): “2.(c) [...] the applicant [...] has had an opportunity, either at the border or within the third country, to make contact with that country’s authorities in order to seek their protection [...]”; emphasis added, HB]. Some past opportunity obviously does not establish a presumption that effective protection is available upon expulsion.
- ¹⁵⁵ The Refugee Convention applies the term “recognition” (or “determination”) of refugee status (as does Article 26 under (a) – see number [529] below).
- ¹⁵⁶ Preamble recital (23) PD – which statement is without prejudice to the “safe neighbouring third country procedure”, cf. Preamble recital (24) PD.
- ¹⁵⁷ The Initiative of Austria (see number [361]) contained an Annex listing safe third countries. Possibly, the obligation to “inform the Commission periodically of the countries to which this concept is applied in accordance with the provisions of this Article” (Article 27(5) PD) serves the purpose of a future common list of safe third countries.
- ¹⁵⁸ The provision does not specify whether the requirement concerns subjection to ill-treatment in the third state, in a subsequent state, or both. A reading “in accordance with international law” (as explicitly required by Article 27(2)(c)) implies both direct as well as indirect *refoulement* are addressed. Further, Article 27(1) explicitly addresses only indirect *refoulement* (as prohibited by the above-mentioned provisions). Read in conjunction, the absence of such a specification in Article 27(2)(c) implies that all implications of the prohibitions on ill-treatment abroad are addressed – both indirect as well as direct *refoulement*.
- ¹⁵⁹ The Procedures Directive however conceives of it as two distinct “concepts”. Therefore, we may not (relying on the term “only” in Article 27(1) PD, see number [523]) apply the conditions laid down in Article 27 on the “safe third country concept” to application of the “concept of first country asylum” (cf. the last clause of Article 26 PD: “In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum, Member States may take into account the content of Article 27(1) [emphasis added, HB]”).
- ¹⁶⁰ Usually, recognition of refugee status implies a “status”, that is, lawful residence (cf. Chapter 8.2.1).
- ¹⁶¹ It also seems to imply an amount of discretion inconsistent with international law, as protection is either available, or it is not, for the Member States do not enjoy a margin of appreciation as to the refugee definition or the scope of the prohibitions of *refoulement* (see numbers [133] and [134]).
- ¹⁶² Article 26 PD, first and last clause (emphasis added).
- ¹⁶³ Refugees who enjoy some alternative protection status are entitled to refugee status under European asylum law, unless their status is equivalent to CEAS refugee status (cf. Article 13 QD and 25(2)(d) PD; see numbers [355] and [428] above). The Member State that issued the status would be responsible for examination of the claim (Article 9(1) DR, see number

[481]). Incidentally, the same applies to the Member State that recognised the refugees addressed in Article 25(2)(a) PD.

¹⁶⁴ Article 9(1) DR.

¹⁶⁵ Article 35A(2) PD.

¹⁶⁶ Article 35A(6) PD.

¹⁶⁷ Article 35A(2)(d) *jo* (3) PD

¹⁶⁸ Article 35A(7) PD.

¹⁶⁹ Article 35A(1) PD.

¹⁷⁰ See Zwaan 2003, pp. 220f.

¹⁷¹ Zwaan 2003, p. 227, with references to relevant German case-law and academic writing.

¹⁷² Preamble recital (18) DR.

Chapter 8

Secondary rights

In this Chapter I discuss the ‘secondary rights’ that are attached to the CEAS protection statuses. The term ‘secondary rights’ is not applied by European asylum law; I subsume under this heading all claims apart from those concerned with qualification for international protection or with procedures for such protection.

8.1 Introduction

[541] The present discussion of ‘secondary rights’ includes standards referred to in European asylum law as the “conditions for residence”¹ or the “content of the status” of refugee and subsidiary protection,² the standards for “reception” of asylum seekers (or applicants),³ and standards for “treatment” of temporary protection beneficiaries.⁴ Moreover, the discussion includes rules concerning family unity (for reasons to be set out below). As in the previous Chapters, I focus on the systematic aspects of relevant legislation, and on their relation with international law.

European asylum law attributes to each protection status its own set of secondary rights. We saw in Chapter 5 that five CEAS protection statuses can be distinguished: refugee status, Article 14(6) refugee status (the status of persons who qualify as a refugee, but may be expelled pursuant to Article 33(2) RC – cf. numbers [341] and [342]), subsidiary protection status, applicant status and, finally, temporary protection status. The sets of secondary rights attached to these statuses are discussed in paragraphs 8.4 – 8.8.

In paragraphs 8.2 and 8.3, I address relevant international law. The only instrument of international law addressing in particular the secondary rights of persons in need of protection is the Refugee Convention; no instrument specifically applies to “subsidiary protection” or “temporary protection beneficiaries” or “applicants”.⁵ Scope of application of Refugee Convention benefits will be discussed in paragraph 8.2.

As stated in paragraph 1.4, implementation and application of rules of international law on family unity are informed by the predicament of persons in need of protection. The relevant rules are discussed under paragraph 8.3. Finally, conditions on restrictions on the freedom of movement are briefly addressed. As the issue is primarily relevant for applicants, I discuss relevant international law in that context (paragraph 8.7.2.1).

8.2 Refugee Convention Rights

8.2.1 Introduction

[542] In Articles 2 to 34, the Refugee Convention sets out a variety of secondary rights of refugees. It is obvious that the personal scope of these provisions encompasses beneficiaries of Directive “refugee status” (cf. number [274]). It is less obvious whether “applicants” or “temporary protection beneficiaries” are entitled to those Convention benefits as well. Therefore, I will discuss the scope of application of Refugee Convention benefits at some length.

The scope of beneficiaries of Refugee Convention benefits is conditioned in three ways. To begin with, by means of qualifications of “refugees” in the relevant provisions (such as “lawfully present” or “resident” refugees). These qualifications are discussed in paragraph 8.2.2.

Secondly, some benefits apply only to refugees whose refugee status has been acknowledged or “recognised” by the host state, whereas other provisions may be relied upon by refugees whose status has not yet been determined. The nature of refugee status determination will be discussed in paragraph 8.2.3, the obligation to determine refugee status in paragraph 8.2.4. The consequences of the findings on these issues for CEAS statuses will be addressed in paragraphs 8.4 to 8.8.

Thirdly, the benefits themselves are qualified in various ways. Thus, some Convention provisions bestow “absolute” rights on refugees, that is, without making a comparison with nationals or aliens. But in other respects, refugees (however qualified) must be treated as nationals, as nationals of the state of their habitual residence, as most favoured aliens, as favourably as possible or, the weakest category, as aliens generally “in the same circumstances”. These qualifications are not discussed separately, but in the context of the various CEAS statuses in paragraphs 8.4 to 8.8.

8.2.2 Qualifications of refugees

The incremental “system” of Refugee Convention benefits

[543] Articles 2 to 34 apply to refugees qualified in various ways – to “refugees” *tout court*, to refugees “lawfully in the territory” of the state and so on. These qualifications are not defined in the Convention. Most authors on

the subject interpret these qualifications as elements of what Hathaway has named an “incremental system”.⁶ The idea behind it is that the refugee has stronger claims for protection when his ties with the host state are tighter. Thus, all refugees are entitled to Convention benefits laid down in provisions applying to refugees *tout court*. If the refugee’s presence is “lawful”, his secondary rights are for that reason enhanced; on top of the benefits for refugees *tout court*, come benefits applying to “lawfully present” refugees. The same applies if he is “residing” or “lawfully residing”, and so on.

The label “system” is something of an overstatement, because the many qualifications that occur in the Refugee Convention do not fit that closely (see number [553]). But arguably, the notion of the “incremental system” may be applied as the label for the above-mentioned objective underlying these qualifications, i.e. the balancing of the needs of the refugee and the interests of the host state.⁷ Thus, the interpretation below is based on the premise that the various qualifications express the idea that the refugee’s claims in or on the host state increase when his ties with the host state tighten.

[544] It appears that four main categories of refugees can be distinguished in the Convention: refugees, refugees “lawfully on the territory” of a state, the refugee’s country of “residence” and refugees “lawfully staying” (or “lawfully resident”). As a sort of variant, the terms “habitual residence” and “domicile” occur. I will discuss all these categories subsequently below. Besides, the Refugee Convention employs yet some other qualifications or conditions for enjoying Convention rights. For example, Article 17 exempts from certain labour market restrictions the refugee

“who fulfils one of the following conditions:

- (a) He has completed three years’ residence in the country;
- (b) He has a spouse possessing the nationality of the country of residence.
A refugee may not invoke the benefits of this provision if he has abandoned his spouse;
- (c) He has one or more children possessing the nationality of the country of residence.”

These qualifications do not pose particular problems, and will therefore not be discussed. But we should observe that they do support the idea behind the incremental system: the stronger the ties with the host state, the stronger the claims for protection.

Refugees tout court

[545] A number of Refugee Convention provisions apply to refugees *tout*

court or to refugees “in the territory” of the Contracting state (see the scheme under number [569]).⁸ The context, that is, other Convention provisions that require “lawful presence”, “residence” and so on, implies that states cannot require lawful presence for enjoying this first set of Convention rights. The implicit distinction between recognised and unrecognised refugees *tout court* will be discussed in paragraph 8.3.2.

Lawfully present refugees

[546] The term “lawfully in the territory” of a contracting state occurs in only three provisions – Articles 18, 26 and 32 RC (on self-employment, freedom of movement and expulsion). In its ordinary sense, the term “lawful” indicates that the refugee’s presence is in conformity with the law of the state where he is.⁹ Article 31 RC provides for some further guidance.¹⁰ According to its heading, the provision concerns “Refugees unlawfully in the country of refuge”. It follows from a reading of Article 31(1) in conjunction with its heading that a refugee’s presence is “unlawful” if he is present “without authorization”. Arguably, it follows that the refugee is “lawfully present” if his presence is “authorised” or “regularised” (the term applied in the second paragraph).¹¹

[547] When is entry or presence “authorised” or (otherwise) “regularised”? Most authors state that any title to remain on a temporary basis suffices for lawful presence – for example, a visa, a work permit and so on,¹² which is indeed implied by the ordinary meaning of the terms “lawful” and “authorisation”. But often, refugees will not possess a permit for temporary sojourn when applying for asylum. Are such refugees unlawfully, or lawfully present during status determination, i.e. when their requests for residence permit are being processed? According to Hathaway,

“an individual who seeks recognition of refugee status in a state party to the Convention, and who has provided authorities with the information that will enable them to consider his or her entitlement to refugee status [...] has ceased to be irregularly present. Once having met the administrative requirements established by the state to consider which persons who arrive without authorisation should nonetheless be allowed to remain there as refugees, the refugee is lawfully present in that country”.¹³

He supports this assertion by reference to a statement to that extent by Mr. Rain of France registered in the *travaux préparatoires* to Article 26 RC.¹⁴ But it is questionable whether this statement can sufficiently support the interpretation Hathaway proposes. Apart from the caution due to any interpretation based on the *travaux* to the Refugee Convention (see number [26] above), it deserves

attention that Mr. Rain did not address the question of what meaning should be attributed to the term “lawful” in the draft Refugee Convention text; rather, he explained which categories of refugees would be regarded as “regularly admitted” under French domestic law. The mentioned statement was not acclaimed as the proper meaning of the term “lawful” in the Refugee Convention.

[548] We saw above that to its ordinary meaning, “lawful” means in conformity with the law, that is, with domestic law. Hence, a refugee can invoke benefits for lawfully present refugees *if* his presence is in conformity with domestic law. But this meaning in no way prescribes *when* presence is lawful. The assumption that the filing of an application for asylum entails “regularisation” entails assigning a special meaning to a treaty term. According to Article 31(4) VTC, this may be done only when it established that the Contracting states so intended.¹⁵ In the absence of a clear indication to that extent, we must assume that the matter is left to domestic law. It follows that if states deny the Refugee Convention benefits applying to a “refugee lawfully in their territory” to a refugee who requested recognition of his refugee status (in the terms of European asylum law, to an applicant), because under its domestic law this applicant was not lawfully present, they do not act in breach of their Convention obligations. Conversely, if the presence of a person who seeks asylum (who requests recognition of his refugee status) is lawful under domestic law, that person is entitled to the Convention benefits applying to “lawfully” present refugees.

Finally, as Vermeulen observes, Article 31(2) RC implies that if the refugee is not admitted to a third country, the host state has no choice but to regularise his presence.¹⁶ The status of unlawfully present refugee is therefore limited in time. But the provision offers no clue for the time span during which this regularisation should occur.

In sum, a refugee is “lawfully” in a state if his presence is in conformity with relevant domestic law. The refugee is “lawfully” in a state if his entry or presence has been “authorised”, or if his illegal entry or presence was “regularised”. Any title to remain on a temporary (or permanent) basis makes presence “lawful” for Convention purposes. Contracting states have the duty to render the refugee’s presence lawful if admission to a third country cannot be secured.

Residence tout court

[549] The qualification “residence” *tout court* appears only twice, in Articles

12 (on personal status) and 25 RC (on administrative assistance). As the Refugee Convention also employs the term “lawful residence” (see below), we must assume that “residence” *tout court* covers unlawful residence as well.

According to its ordinary meaning, residence implies either “the act or fact of dwelling in a place for some time”, or “the act or fact of living or regularly staying at or in some place for the discharge of a duty or the enjoyment of a benefit”.¹⁷ If the first meaning applies, a refugee is resident after the lapse of a certain amount of time; then, “residence” is merely a matter of fact. The second possibility entails that residence is a matter of intent: one is residing if one settles down, will stay for a certain period of time.

Does the first or the second meaning (or both) apply to “residence” *tout court*? Article 17(2) RC (quoted above under number [544]) speaks of the refugee who “has completed three years’ residence in the country”. Here, the term “residence” obviously refers to a mere lapse of time. Arguably, the same holds true for Article 6.¹⁸ This meaning moreover fits in well with the idea of the incremental system: by the lapse of time, the refugee’s ties with the host state are strengthened. The second meaning of the term “residence” that refers to an intent of prolonged presence does not fit in so well with this idea. There is no reason why mere intent of an unlawfully present refugee to stay in the host state would accrue the obligations of that state. Moreover, it would not or hardly be possible to distinguish the refugee with this intent from the refugee without this intent. Yet the Refugee Convention appears to make the distinction between those simply present and resident refugees.

Hence, we can assume that the term “residence” implies the lapse of a certain period of time, not the intent of prolonged sojourn. How much time should lapse before we can speak of “residence” for the purposes of the Refugee Convention? Paragraph 14 of the Schedule attached to the Refugee Convention employs the term “residence” in contrast to “transit through” and “establishment” in a state.¹⁹ This implies that “residence” sets in after an only brief period of time, and that permanent settlement is not required. Referring to state practice, Grahl-Madsen defines temporary sojourn as the period of usually three months during which an alien is authorised to be present on the basis of a visa or, if no visa is required, without having to report to the aliens authorities; this period ends almost universally after three months.²⁰ European law also defines short-term residence as three months.²¹ Arguably, presence continued after the expiration of a period of three months would be “residence”.

Lawful residence

[550] The Convention further employs the qualification “lawfully residing”

(Article 28) or “lawfully staying” (in seven provisions, see number [569]). The French language version applies the term “*résidant régulièrement*” (or “*qui réside régulièrement*”) to both qualifications; arguably, they are synonymous.²²

We saw above that the qualification “resident” *tout court* refers to a lapse of time (of three months). There is no reason to suppose why this meaning would not apply to the qualification “lawfully resident”. And according to Hathaway, it follows from the *travaux préparatoires* that “it is the refugee’s *de facto* circumstances which determine whether or not” the requirement of “lawful residence” is satisfied.²³ Thus, the lawfully present refugee who has resided for over three months in the host state is “lawfully staying” there for the purposes of the Refugee Convention.

Could the second literal meaning of “residence”, referring to intent of a longer sojourn, also apply to “lawful presence”? We saw above that the intent of the refugee is irrelevant, but this may be different for the intent of the host state. If it explicitly allows the refugee to stay for a longer period, it establishes a stronger tie with him than with refugees who are not officially allowed to stay (not lawfully present), or merely allowed to stay for a short period of time (lawfully present refugees). Hence, the meaning fits in well with the idea underlying the incremental system. Arguably, if the host state issues a residence permit allowing the refugee to stay longer than three months, that refugee is lawfully staying even if he has not yet sojourned for three months in that state.²⁴

Other qualifications

[551] Two more terms are applied in the Convention that seem to address the length of sojourn. Article 14 (artistic rights) and the second and third paragraphs of Article 16 (on access to courts) speak of “habitual residence” (“*résidence habituelle*”), or some variant thereof; Article 12(1) (on legal status) employs the term “domicile”.

Some authors suggest that the term “habitual” implies a longer stay than simple residence, employed in the Articles 12 and 25.²⁵ It is difficult however to assess the difference between simple and habitual residence, as residence itself implies a sojourn “of some time”, i.e. habitual sojourn. We may further observe that Article 14 and 16 explicitly address situations where more than one state is involved.²⁶ Arguably, the term “habitual residence” does not define a more prolonged sojourn than simple residence, but defines which state must fulfil the concerned obligation if the refugee has connections with two states. For example, if a refugee has a residence permit from one state, his state of lawful residence, but lives for a considerable time in another state, that second

state may also be a state of residence. The term ‘habitual residence’ limits the obligations laid down in Article 14 and 16 to the first state – quite in accordance with the premise that the various qualifications serve to balance the interests of the host state and the needs of the refugee.

[552] The other term that seems to address the length of sojourn is “domicile”, employed in Article 12(1), on personal status:

- “1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.
2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.”

The ordinary meanings of the term ‘domicile’ are “1: dwelling place: place of residence: home; 2a: a person’s fixed, permanent, and principal home for legal purposes”.²⁷ The principal, as well as the specialised, meaning of the French “*domicile*” is supportive of the second meaning.²⁸ If the first meaning applied, the subsidiary reference to residence would be meaningless.

The state of domicile is therefore the state where the refugee resides permanently; if he has no permanent residence anywhere, the law of the state of simple residence applies (cf. the second part of Article 12(1) RC). The Convention does not address the situation where the refugee has no place of residence (yet); the issue is therefore left to the domestic law of the Member States. It should be noted that refugees who have no state of domicile (and are thus merely sojourning in a contracting State) are not bereft of any benefit due to the use of the term “domicile” in Article 12 RC. This term does not set a condition as to the degree of attachment with a state, for Article 12(1) does not confer a right on refugees to make claims against the Contracting states. Rather, it sorts out which legal regime applies as to the refugee’s personal status. It is the second paragraph on the other hand that does confer an obligation, and it addresses “a Contracting state” - not even presence is required.

Conclusions

[553] The refugee’s entitlement to benefits accrues, as his bonds with the host state become stronger. This incremental system consists of four main categories. The first concerns refugees *tout court*, refugees who are lawfully or

unlawfully present in the territory of the states. For the second category, “lawful presence” is required. The requirement is satisfied if some title or formal consent of presence has been issued. The third category addresses “resident” refugees, that is refugees who have been present in the host state for over three months. The fourth category concerns “lawfully staying” (or “lawfully resident”) refugees. It applies to refugees who are lawfully present and have been present for over three months. It also applies to refugees who have not yet been present for three months, but who have received a residence permit allowing them to stay for a period of more than three months. “Habitual residence” and “domicile” do not form separate categories, requiring a longer period of presence than mere “residence”. Rather, they serve to distinguish between several states where the refugee may be resident.

We may observe that the refugee who is merely resident is not lawfully present, and vice versa. Hence, the “incremental system” is not fully incremental, or not fully a system, because the one set of benefits is not encompassed by the next one. But we may also observe that the idea underlying this system, the balancing of claims of refugees and interests of host states, does serve to make sense of the various qualifications.

8.2.3 The nature of refugee status determination

8.2.3.1 The declaratory and constitutivist views

[554] Under European asylum law, a person who requests international protection under the Refugee Convention is an “applicant”, and becomes a “refugee” only after his “recognition as a refugee” by a Member State.²⁹ Accordingly, whereas the “reception conditions” of “applicants” are subject to various restrictions as to their freedom of movement, access to the labour market or social security system and so on, Directive refugee status beneficiaries enjoy all Convention benefits (cf. paragraphs 8.4 and 8.7). Thus, the relevant legislation interprets the term “refugee” in the Articles 2 to 34 RC as “recognised refugee”, and treats recognition of refugee status as an act constitutory for enjoying Convention benefits (below: the “constitutivist view” on refugee status determination).

According to many authors, the constitutivist view is at odds with the Refugee Convention, because a person is a refugee as soon as he fulfils the requirements of Article 1 of the Refugee Convention.³⁰ In this second view (below: the “declaratory view”), recognition may eventually take place, but is

not mandatory for entitlement to Convention benefits. As the UNHCR Handbook puts it:

“[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee”.³¹

If status determination is indeed purely a declaratory act, a person is entitled to Convention benefits from the very moment he fulfils the criteria of the refugee definition – not only after “recognition”, but already when he is an “applicant” or “temporary protection beneficiary”.

[555] Below, I will at some length address the question which of these views applies to which Convention provisions. Before entering this discussion, we should acknowledge that the issue is not self-evident. On the one hand the Refugee Convention does not explicitly require status determination for entitlement to its benefits. On the other hand, the Refugee Convention does, in several places, explicitly refer to status determination, so apparently assumes that recognition takes place (see number [556]). Both views are perfectly capable of accommodating these facts. This is so, because they approach refugee status from different angles.

In the declaratory view, being a refugee is primarily a matter of fact. It is the Refugee Convention itself that attaches legal consequences to this factual situation: entitlement to the benefits mentioned in its Articles 2 to 34. Indeed the benefits must be sought from, or be granted by the Contracting states. But recognition is not mandatory: recognition upon application for refugee status is merely a formal acknowledgement by the state that the factual situation meant in Article 1 RC has come into being. As recognition has no legal consequences for refugee status, there was no need to address status determination in the Refugee Convention. States may perform status determination, or do without. The allusions to recognition and status determination are not at odds with this view. The Convention presupposes the existence of status determination and recognition, as the states will presumably be eager to sort out refugees from those applicants to whom they do not owe protection.

In the constitutivist view, being a refugee is a matter of law, not of fact. Refugee status is a legal category, the designation of a legal relation between the refugee and the state from which he has requested protection. It is to this legal relation that Convention benefits are attached. This relationship is established by

recognition by the Contracting state. Before recognition, i.e. before this relation is established, a person requesting protection as a refugee is an alien claiming preferential treatment. This alien may indeed fulfil the requirements of Article 1 RC; in a sense, therefore, recognition is indeed declaratory – declaratory of the fulfilment of the criteria of the refugee definition. But this does not render recognition as an additional requirement one should expect to be mentioned in the Convention, for a person becomes a refugee only after the relation between him and the state has been established – i.e. after determination of refugee status.

In order to sort out whether recognition is required for the entitlement to Convention benefits or not, I will first discuss the text, then object and purpose of the Refugee Convention as a whole. As we will see, object and purpose of individual provisions leads to the conclusion that some provisions presuppose that status determination has taken place, whereas other provisions necessarily apply to unrecognised refugees too.

8.2.3.2 The Refugee Convention text

[556] Article 1, headed “Definition of the term “refugee”, states (as far as relevant here) that

“for the purposes of the present Convention, the term “refugee” shall apply to any person who owing to well-founded fear of being persecuted is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

Thus, for the purposes of Articles 2 to 34 RC, “the term refugee shall apply” to anyone who fulfils the requirements of Article 1A(2). No mention is made of recognition or status determination. Hence, the provision favours the declaratory view, but on closer scrutiny, Article 1 is ambiguous on the matter, for Article 1A(1) states that

“[d]ecisions of non-eligibility taken by the International Refugee Organization during the period of its activities³² shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section”.

It appears, then, that “the status of refugee” is “accorded”, not simply incurred. Moreover, Article 1C states that

“This Convention shall cease to apply to any person falling under the terms of section A if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

- (2) Having lost his nationality, he has voluntarily re-acquired it, or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; [...]
- (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; [...]

The term “shall cease to apply” seems supportive of the declaratory view: it conveys that refugee status ends automatically if a certain factual situation sets in. However, if being a refugee in the sense of Article 1A(2) were purely declaratory, Article 1C(5) and (6) would be superfluous. For then, it would be a matter of course that the Convention would cease to apply to any person who ceases to fulfil one or more requirements mentioned in Article 1A(2). As it is, Article 1C(5) and (6) speak of recognition. Moreover, all sub-paragraphs of Article 1C presuppose, that one continues to be a “refugee”, although Article 1A(2) does not apply any more (in the period between the moment some requirement of Article 1A(2) is not fulfilled any more, and the moment the recognised refugee can no longer continue to refuse to avail himself of the protection of his country of origin). The paragraphs (1) to (4) of Article 1C all mention circumstances wherein Article 1A(2) does not apply any more. Arguably, they therefore necessarily address “recognised refugees”, though without stating so explicitly.

One more Convention provision explicitly refers to some sort of formal acknowledgement of refugee status.³³ Article 9, on “Provisional measures”, states that

“[n]othing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security”.

Apparently, it needs “determination” for a person to be “in fact” a refugee.

[557] Obviously, then, the Refugee Convention presupposes that status determination or recognition of refugee status takes place or may take place. Can we conclude on this basis that recognition is constitutivist in nature? It does not follow from the quoted references that such status determination or recognition is *mandatory* for enjoying Convention benefits. Article 1A(1) speaks of according “refugee status”, not of according Convention rights.³⁴ Article 1C supposes that recognition takes place, but it does not follow that *only* after recognition a person to whom Article 1A(2) applies is entitled to enjoy the benefits of the Refugee Convention. As to Article 9, the provision rather endorses the declaratory view. For if a person whose refugee status has not been determined were not a refugee in the sense of Articles 2 to 34 RC, the Refugee Convention would not curtail the competence of the Contracting states to take any measure towards him, neither in peace nor in war time. As it is, it follows from Article 9 that the Convention prevents the Contracting states from “taking provisionally measures” if there is no “war or other grave and exceptional circumstances”. Hence, in normal circumstances a person whose refugee status is being determined falls within the scope of the Refugee Convention. In sum, the Convention text supposes that status determination or recognition does take place, but also, that unrecognised refugees are entitled to (some or all) Refugee Convention benefits.

8.2.3.3 Object and purpose laid down in the Preamble

[558] The purpose and object as laid down in the Preamble to the Refugee Convention further reinforce the declaratory view. According to the first consideration,

“the Charter of the United Nations and the Universal Declaration of Human Rights [...] have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination”

Usually, persons can take resort to the country of their nationality (or habitual residence) for protection of these rights, but this is not so with refugees. Indeed the words “without discrimination”, given emphasis by their position at the end of the first consideration, prepare for the focusing of this general attachment to human rights protection to refugees in particular:

“the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms”.

The following consideration connects this concern for the exercise of fundamental human rights by refugees with Convention benefits:

“it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement.”

Together, these considerations indicate protection of fundamental human rights of refugees as the primary objective of the Convention. The declaratory view fits in better with this objective, as it secures more protection from the moment of application than does the constitutivist view.

The final consideration shifts attention to the needs of the Contracting states: “CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation [...]”.

Thus, more equal division of the burden, in order to avoid that these become “unduly heavy” for certain states, is another purpose of the instrument. Due to its international scope, the issue must be solved by international co-operation. Discretion on behalf of the states as to the moment they offer Convention protection is less compatible with this purpose than the declaratory view.

So, the text of the Refugee Convention assumes that recognition of refugee status does or may occur; Articles 1A(2) and 9 imply that the Convention does at least partially apply to refugees whose status has not yet been determined. Object and purpose of the Refugee Convention as laid down in the preamble is further supportive of a declaratory understanding of refugee recognition. Should we conclude that recognition is therefore immaterial for entitlement to Convention benefits? Object and purpose of individual Convention provisions offers a more mixed picture.

8.2.3.4 Object and purpose of individual provisions

Article 33 RC

[559] Article 33(1) RC prohibits states “to expel or return (“refouler”) a refugee [...] to the frontiers of territories” where he fears persecution. There are two sound reasons to assume that the term “refugee” is applied here in the declaratory sense. Firstly, if the provision did not apply to unrecognised refugees, the Refugee Convention would allow the Contracting states to expel

refugees to any state if, and as long as, they do not determine their status. Enjoying Convention protection would then be totally at the discretion of the states. This consequence is incompatible with both purposes of the Refugee Convention identified above, protection of human rights and spreading the burden of asylum. Secondly, the term “refouler” makes explicit that the prohibition of Article 33(1) applies to requests for protection made at the borders of the Contracting states,³⁵ that is, to persons whose refugee status has not been determined.

Article 32 RC

[560] A reading to object and purpose of Article 33(1) RC hence once more confirms the declaratory reading of the term “refugee”. But the matter is different for some other Refugee Convention provisions, most conspicuously, Article 32 RC. It runs as follows:

- “1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

Like Article 33, Article 32 addresses expulsion, but it offers stronger protection in three respects. First, it prohibits expulsion *tout court*, whereas Article 33 RC only prohibits *refoulement* to the state where the refugee fears persecution, and hence allows for expulsion to safe third countries. Secondly, Article 32(2) offers some procedural guarantees, which are altogether absent in Article 33. And thirdly, the refugee who poses a threat to national security or public order must, if expelled, be allowed the opportunity to seek admission elsewhere (Article 32(3)) – a clause absent in Article 33 RC. Entitled to this stronger protection are refugees “lawfully in [the] territory” of the Contracting state – as opposed to the “refugee” *tout court* in Article 33 RC.

[561] Does Article 32 apply to unrecognised refugees? This reading leads to unreasonable results. To begin with, it would mean that Article 33 has very little

meaning next to Article 32. Article 33 would apply only to refugees who enter “unlawfully” (without authorisation, see number [546]), and then only from the moment they request asylum until the moment their presence is authorised. Moreover, as Goodwin-Gill points out, “in principle there appears to be no reason why the temporarily present refugee should not be subject to the same regime of deportation as applies to aliens generally”, given that Article 33 RC applies in any event.³⁶ Finally, it would mean that refugees can in fact choose their host state: the exception of the safe third country could not be applied to any alien whose presence is “authorised”, as Article 32 bars expulsion to any state. This outcome would contradict state practice.

One could argue that the lawfulness of the refugee’s presence ends at the moment when the state dismisses the application for asylum on the ground that the exception of the safe third country applies. Thus, if a state decides to expel the applicant (the refugee whose status has not been determined) to a safe third state, the refugee is because of that decision no longer “lawfully” in the state, and accordingly Article 32 does not apply to him. But this approach would deprive the guarantees of Article 32 of all meaning.³⁷ For instance, if a state concludes that a lawfully present refugee poses a threat to its national security and issues an expulsion order, the lawfulness of the refugee’s presence ends. But we must assume that the refugee is nevertheless still “lawfully” present for the purposes of Article 32, if, for example, the requirement that he should be allowed a “reasonable period” to obtain admission elsewhere (Article 32(3) RC) is to have any meaning.

Goodwin-Gill therefore proposes reading the provision as applying to “lawfully staying (or resident) refugees”, a reading that accommodates state practice restricting the benefits of the provision to refugees to whom “asylum” has been granted.³⁸ Although providing for an attractive solution, this reading must arguably be dismissed. Given the carefully carved out system of qualifications in the Refugee Convention,³⁹ we cannot just substitute the qualification “lawfully” by “lawfully staying”. Further, we saw above that a refugee is, in principle, “lawfully staying” after a lawful presence of more than three months. A refugee may thus very well be “lawfully staying” before a decision has been taken whether or not asylum will be granted to him – or rather, whether he will be expelled to a third state. Thus, reading “lawfully” as if it said “lawfully staying” does not solve the question.

[562] It follows that the lawfulness of the refugee’s presence cannot account for the stronger protection Article 32 RC accords to him, than Article 33 accords to the refugee *tout court*. The alternative reading is assuming that the

beneficiaries of Article 32, the lawfully present refugees, are *recognised* lawfully present refugees. Then, Article 33 RC would have substantial meaning next to Article 32: it would cover both unrecognised refugees (such as applicants and temporary protection beneficiaries) as well as recognised refugees who are not lawfully present.⁴⁰ As a consequence, Article 32 would not interfere with the application of the safe third country concept. This reading is also compatible with the state practice mentioned above – the status of lawfully present recognised refugees is “asylum”.

The question remains then, whether the recognition requirement implicit in Article 32 is implied by the term “lawful” or by the term “refugee”. In its ordinary sense, “lawful” means “in conformity with the law”, which does not entail recognition. And a special meaning like “lawful because of status determination” may be given to a treaty term only if it is established the Contracting states intended it (cf. Article 31(4) VTC, quoted under number [22]). The other instances where the term “lawful” occurs in the Refugee Convention do not imply this special meaning. The term “refugee” as defined in Article 1 RC, on the other hand, may very well imply recognition. We saw above that in Article 1A(1) and, more importantly, 1C RC “refugee” means recognised refugee.

Other provisions

[563] It appears, that Article 32 applies only to recognised refugees, and Article 33 to unrecognised refugees as well. Hence, we can not decide that status determination is in general declaratory or constitutivist in nature. Rather, we will have to sort out for each Convention benefit separately which of the two views applies.

I think that there is good reason to assume that the term “refugee” means “recognised refugee” in other provisions (than Articles 1C and 32 RC) as well. To begin with, Article 34 states that

“[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings”.

It is most unlikely the Contracting states have the obligation to facilitate naturalisation “as far as possible” of refugees whose status has yet to be determined, i.e. to naturalise applicants.

According to Article 28 RC,

“[t]he Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory

[...], and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory [...].”

The issue of a travel document in accordance with the Schedule, a refugee passport, very much amounts to formal recognition of refugee status. Moreover, the issue of the refugee passport entails obligations for other Contracting states *vis-à-vis* the document holder: they must accord the rights the holder is entitled to as a “refugee”.⁴¹ If one assumes that unrecognised refugees can invoke Article 28, a Contracting state would have to impose obligations on other states towards persons who are not refugees. This would be an unreasonable result. Moreover, such consequences would be contrary to the objective of preventing the refugee “problem from becoming a cause of tension between States”.⁴² Hence, we should assume that Article 28 applies to recognised refugees only.

Article 5, finally, states that

“[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention”.

Read in conjunction with Article 7(1), stating that

“[e]xcept where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally”,

it appears that Article 5 addresses benefits accorded to refugees in that particular capacity, i.e. to recognised refugees.

[564] Do other provisions yield indications that the declaratory view applies? Several authors have convincingly argued that Article 31 RC addresses “presumptive” (unrecognised) refugees.⁴³ We saw above (number [546]) that this provision prohibits the imposition of penalties upon refugees who entered or are present illegally – that is, of refugees whose refugee status has not yet been determined.

Other Convention provisions than those discussed above do not yield particularly strong indications that the term refugee is applied in either the declaratory or the constitutivist sense. Arguably, in the absence of such indications we may assume that the term is applied in the declaratory sense. A reading of the relevant provisions in conjunction with Article 1A(2) RC suggests so. Besides, object and purpose as laid down in the Preamble call for an extensive reading of the scope (see number [558] above).

8.2.3.5 Concluding remarks

[565] Two views on the legal character of refugee status determination are possible. According to the declaratory view, any person fulfilling the requirements of Article 1 RC is entitled to Convention benefits, regardless of his status having been determined or not. According to the constitutivist view, states are obliged to accord Convention benefits only after status determination.

Articles 1A(2) and Article 9 RC imply a declaratory understanding of the term refugee, and this declaratory view is further endorsed by object and purpose of the Refugee Convention as laid down in its Preamble. It does not follow from either of the mentioned provisions that the declaratory view necessarily applies to *all* Convention benefits. Article 1C and Article 9 suppose recognition and status determination does take place, and the former provision does attach legal consequences to it. We further saw that the Articles 1C, 5, 28, 32 and 34 RC, read in context and in the light of their object and purpose, all presuppose status determination. A reading of Article 33 to object and purpose implies that the provision applies to unrecognised refugees; the same holds true for Article 31. Other provisions do not yield indications that the constitutivist view applies. A reading in conjunction with Articles 1A(2) and 9 RC, and in the light of object and purpose of the Refugee Convention as laid down in the Preamble suggests that those other provisions apply the term refugee in the declaratory sense.

[566] The conclusion that the term refugee means a “person fulfilling the requirement of Article 1 RC” in some, and a “person recognised as fulfilling the requirements of Article 1 RC” in other provisions may raise two objections. First, one may feel that it is unreasonable to read two different meanings into one term. Second, one may argue that recognition amounts to an additional requirement that cannot apply, as the Refugee Convention does not state it explicitly.

Arguably, these objections are not conclusive. We should note that in other instances, Convention provisions imply requirements on enjoying benefits too. Thus, According to Article 22(1),

“[t]he Contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education”.

Obviously, it would be unreasonable to state that, say, the Netherlands has the obligation to provide refugees world wide with elementary education on the same footing as they accord to their nationals. It appears that Article 22 implicitly requires presence. Put otherwise, the term refugee here has the meaning “refugee in the territory of the Contracting state” - a meaning the

term “refugee” obviously does not have in, for example, Article 30,⁴⁴ and a condition that is explicitly stated in, for example, Article 27 RC.⁴⁵ The lack of an explicit reference to the requirement of the refugee’s being present or not should not be regarded as a flaw in the text of the Convention. Rather, the requirement follows from a reading to object and purpose.

That both views may apply to one and the same issue, the entitlement of a “refugee” to Convention benefits, may further appear less of an anomaly if we draw into account a similar distinction, that applies in the law on the recognition of states.⁴⁶ In the past, the question of whether recognition of states is declaratory or constitutivist in nature has been the subject of scholarly debate. The former view holds that entities fulfilling certain requirements – control over a certain territory and so on – are states, and the recognition by other states is hence merely a declaratory act. Constitutivists held that only by recognition by other states could an entity enter the international community of states. The latter view has been abandoned, as it cannot explain why the existence of some states is acknowledged, and legal consequences attached to it, by states that do not recognise them formally (for example, Arab states invoking United Nations declarations against the “entity” Israel). But the now generally accepted declaratory view does not entail that the recognition of states is without legal consequences. As doctrine holds it, unrecognised states do enjoy certain rights – for example, the states that did not recognise them cannot invade them at will. But recognition is a condition for other aspects of acting as a state – for example, the establishment of formal diplomatic relations. So, recognition of states is declaratory of statehood, and hence not mandatory for enjoying the rights that international law attaches to *de facto* statehood. But to a certain extent recognition is also constitutivist – as far as rights are concerned the other states can grant them at their sovereign will.

In summary, both the constitutivist understanding of the term refugee and the declaratory view are quite well compatible with the Refugee Convention. Nor should their simultaneous applicability to the issue of entitlement to convention benefits raise difficulties. Finally, the dual understanding of the term refugee is compatible with the finding that the text of the Refugee Convention implies both a declaratory as well as constitutivist reading of the term.

8.2.4 The obligation to determine refugee status

[567] Do the states party to the Refugee Convention have an obligation to

determine whether or not an applicant for refugee protection is in fact a refugee? The Refugee Convention does not explicitly require that states perform status determination upon appeal to the Refugee Convention.⁴⁷ But the absence of an explicit obligation is not necessarily the end of the matter. Just as the Convention implicitly requires recognition for entitlement to certain Convention benefits, it may implicitly require states to perform status determination.⁴⁸

The Articles 1C and 9 RC explicitly suppose that states do perform a determination of refugee status (see number [556] above). It does not follow that they therefore *must* perform this determination. Meijers however points out that the obligation to carry out status determination follows from the obligation to perform treaty obligations “in good faith”, as well as from the object and purpose of the Refugee Convention.⁴⁹ Refugee protection would not be effective unless refugee status determination took place, as far as the Convention benefits are concerned that apply to recognised refugees only. If states could at will refuse to determine refugee status of applicants, they could at will deny them the issue of the refugee passport and hence the possibility of going abroad (Article 28), as well as the security that Article 32 offers. This would render these provisions quite meaningless for the protection of refugee rights, which would be at variance with the object and purpose as laid down in the Preamble (see number [558]). In summary, object and purpose and the obligation to perform treaty obligations in good faith imply an obligation to determine refugee status.

[568] Accepting that states do in principle have the obligation to perform status determination, the question remains of *when* precisely a state is in breach of this obligation. In general, one may state that if the status determination takes “unreasonably” long, the state acts in breach of its obligation to perform its duties under the Refugee Convention. But the Refugee Convention does not offer clear clues as to how long status determination may take. Article 9 speaks of provisional measures concerning a person “pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security”. Arguably, the condition that the necessity of “continuance” be determined, that is, the condition that this necessity be re-assessed during the status determination, suggests that this status determination may take up a considerable amount of time. Likewise, the grant of temporary protection in answer to a request for refugee recognition is not necessarily in breach of the obligation to perform status determination. If a state is unable to properly

process the request for refugee status, postponement of the determination is not in breach of its obligation to perform its duties in good faith. This would be different if the temporary protection were granted on the mere grounds that numbers of applicants rise, or that the causes for flight are presumably of a temporary nature.

Arguably, though, the Refugee Convention does indicate a time limit. According to Article 7(2),

“[a]fter a period of three years’ residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States”. In this sense, after three years’ residence the refugee cannot be treated any more as a national of a foreign state. Article 17(2) exempts from labour market restrictions any refugee who “has completed three years’ residence in the country” – next to refugees with family ties with the host state (see number [544] above). It appears, then, that after three years’ residence the refugee enters the final stage of the incremental system of Convention benefits. It would be at variance with this structure underlying the Convention that the refugee, who definitely settled down in the host state, still lacked the protection of Articles 28 and 32. Hence, it appears that after three years’ (simple) residence refugees are entitled to the full scope of Convention benefits, including those applying to recognised refugees only included.⁵⁰

8.2.5 Conclusions

[569] The Articles 2 to 34 RC underlie a system of balancing the claims and needs of refugees and the interests of the host state. This system makes use of three variables.

Firstly, the explicit qualifications of refugees. It appears that four main categories can be distinguished: present, lawfully present, resident and lawfully resident refugees. Together, these categories constitute an incremental system; for example, resident refugees are also entitled to benefits conferred to refugees *tout court*. A refugee is “lawfully” present for the purposes of the Convention if his presence is in conformity with domestic alien’s law. Any title for presence may do – a visa, a temporary working permit, or permission to stay pending the outcome of asylum proceedings. A refugee is resident if he outstayed the period of temporary sojourn – for practical purposes, after three months. And a refugee is lawfully resident (lawfully staying) if he is lawfully present and has stayed for over three months, or if he is authorised to stay for more than three months. The terms “habitual residence” and “domicile” do not

define lawfulness or length of sojourn, but rather serve to distinguish between several states with which the refugee may have ties.

A second variable concerns the distinction between recognised and unrecognised refugees. Articles 1C, 28, 32, 34 and 5 apply to recognised refugees only; the remaining benefits apply to unrecognised refugees as well. States have an obligation to perform status determination, but there is no strict time limit for doing so – except that after three years' residence, any refugee is entitled to benefits applying to recognised refugees as well.

The third variable concerns the qualifications of the various benefits, which will be addressed where necessary in the discussion of the secondary rights attached to the European protection statuses below (paragraphs 8.4-8.8).

These results are summarised in the scheme below:

Scheme 3 - The incremental system of Refugee Convention benefits

Qualification of benefit → Qualification of refugee↴	No comparison	Nationals	Most favoured aliens	As favourable as possible, or as aliens generally	Aliens generally
Simple presence	3, 5, 27, 30, 31, 33, 34	2, 4, 20, 22(1), 29		13, 22(2)	
Simple residence	25	12, 14, 16(2)-(3), 17(2)			
Lawful presence	32			18	26
Lawful stay/residence	28(1)	23, 24	15, 17(1)	19, 21	

In **bold**: recognition required

In *italics*: application restricted to states of “habitual residence” or “domicile”

8.3 International law on family unity

Asylum and family unity

[570] In this paragraph, I address international law on family unity of persons in need of protection. No instrument of international law imposes obligations on the Member States as regards maintenance or restoration of the family ties of persons in need of protection in that particular capacity. The provision coming

closest to it is the appeal to the Contracting parties to the Refugee Convention to ensure maintenance of family unity, made in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.⁵¹ But this appeal is only a “recommendation”, thus not an obligation, and hence needs to not be addressed here.

Articles 17 and 23 CCPR as well as Article 8 ECHR address respect for family life at large; that is, they apply to persons in need of international protection as well as to others. Implementation and application of these treaty obligations is informed by the particular position of persons in need of international protection, and will therefore be discussed here (cf. number [18]). As Articles 17 and 23 CCPR have only limited impact next to the well-established obligations for the Member States under Article 8 ECHR, I will address the former two provisions where they are particularly relevant, for claims to maintenance of family unity of applicants (see number [617]). In the present paragraph, I address the implications of Article 8 ECHR as interpreted by the European Court of Human Rights, as far as is relevant for rules of European asylum law on family unity.

The right to respect for family life

[571] Article 8 ECHR runs as follows:

- “1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, or for the protection of health”.

State obligations concerning the family life of aliens arise in principle only if one of the aliens has “lived” or “resided”⁵² or has achieved “settled status”⁵³ in the state concerned. The European Court of Human Rights has not defined in the abstract when a status must be considered as “settled”, but it appears that the degree of permanence of residence is a material factor (see further number [582] below).⁵⁴

Article 8 ECHR requires “respect” only for relationships that qualify as “family life”. Family life encompasses first and foremost the relationships of the “core family”- those between adult partners, and between parents and minor children. As to partners, the relationship arising from a “lawful and genuine marriage” qualifies as family life, also if the spouses have not cohabited but “genuinely wished to cohabit and lead a normal family life”.⁵⁵ Non-marital relationships may also qualify as family life, certain conditions ful-

filled; the relevant factors include “whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means”.⁵⁶ As to the relationship between parents and children, from the moment of the child’s birth “there exists between him and his parents a bond amounting to “family life”, even if the parents are not then living together”, although subsequent events may exceptionally break this bond.⁵⁷

As far as migration law matters are concerned, the Contracting states’ obligations as regards respect for ‘family life’ are “normally limited to the core family”.⁵⁸ Relationships with relatives other than partners or minor children (such as the relationship between minors and their grandparents, or between adult brothers and sisters) can qualify as family life only in case of “further elements of dependency involving more than the normal emotional ties”.⁵⁹

Positive and negative obligations

[572] Article 8 ECHR hence imposes a duty to “respect” the “family life” that exists between an alien with, in principle, settled status and (roughly speaking) his partner or child or, if he is a minor, his parent. This duty may involve two kinds of obligations. First, the Contracting states have the negative obligation to abstain from “arbitrary interference by the public authorities”.⁶⁰ Thus, expulsion of an alien leading to separation from his child residing in a contracting state would be “interference” with the family life between the parent and child, and be consistent with Article 8 ECHR only if the conditions set out in Article 8(2) ECHR are met. Secondly, “there may in addition be positive obligations inherent in an effective “respect” for family life” as meant in Article 8(1) ECHR.⁶¹ These positive obligations may imply a duty to authorise entry and residence of a family member of the alien onto the territory of the Contracting state.⁶²

The dividing line between (and hence the scope of) positive and negative obligations under Article 8 ECHR is particularly unclear, and aliens law make no exception. In *Gül*, the Court itself observed that “the boundaries between the State’s positive and negative obligations under [Article 8] do not lend themselves to precise definition.”⁶³ A request for a residence permit by family members who are present on the territory of a Contracting state may address the positive obligation under Article 8 ECHR; a request for such a permit for a family member who has not yet entered the contracting state may address the negative one.⁶⁴ So, we cannot equate the positive obligation under Article 8 ECHR with the obligation to admit an alien previously not authorised to reside, and the negative obligation to allow further presence. Maybe the dis-

inction rather addresses the opposition between an obligation not to disrupt existing family life and the obligation to facilitate (re-)establishing family life.⁶⁵ Moreover, the distinction between the positive and negative obligation may in itself bear few legal consequences. The European Court of Human Rights stated in *Gül* that the “principles” that apply to the positive and the negative obligation are “similar”:

“In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation”.⁶⁶

Judge Martens observed in his dissenting opinion to this judgement that for several purposes

“it makes no material difference whether a positive or a negative obligation is at stake. The present doctrine notably implies that the distinction between the two types of obligation has no bearing on either the burden of proof or the standards for assessing whether a fair balance has been struck”.⁶⁷

Still, there is a noticeable difference in outcome in cases brought before the Strasbourg Court addressing the positive and the negative obligations. Whereas it has found a breach of the negative obligation in numerous cases, a breach of the positive one has been accepted in only one case up till now.⁶⁸ A possible explanation for the Court’s relatively reserved approach in immigration matters could be the nature of the interests involved.⁶⁹ We saw that a “fair balance must always be struck” between the interests of the state and those of the individual. One of the interests whereon a Contracting state may rely in this context is its “economic well-being”, which includes regulation of the labour market⁷⁰- a matter where the state undoubtedly has a quite wide margin of appreciation. In expulsion cases, states cannot invoke that well-being, and their margin is correspondingly narrower. But another possible explanation for the variance in the margin of appreciation in family reunification cases may be the involvement, or not, of ‘core obligations’. According to Van Walsum, where the core obligation under Article 8 ECHR to allow for the normal development of family life between (in particular) parents and children is involved, the European Court leaves the states a very small margin of appreciation.⁷¹

The particular position of persons in need of protection

[573] However all this may be, for the present purpose it is sufficient to observe that both in admission as well as in expulsion cases a “fair balance”

must be struck between the interests of the alien and those of the state. And it is in this context that the particular predicament of persons in need of protection has implications for application of Article 8 ECHR.

First, in admission as well as in expulsion cases, an important question appears to be whether family life could also be established in the alien's country of origin (rather than in the Member State), or whether "major obstacles" stand in the way.⁷² Obviously, the country of origin of a person in need of international protection cannot constitute an alternative for enjoying family life. In the case of *Sen*, the Court concluded that

"En ne laissant aux [...] requérants que le choix d'abandonner la situation qu'ils avaient acquise aux Pays-Bas ou de renoncer à la compagnie de leur fille aînée, l'Etat défendeur a omis de ménager un juste équilibre entre les intérêts des requérants, d'une part, et son propre intérêt à contrôler l'immigration, de l'autre [...]"⁷³

This holds true *a fortiori* in cases where a state refuses the entry of a family member of, say, a refugee from the country where the refugee has a well-founded fear of being persecuted. The European Court of Human Rights has already made this clear in *Gül*.⁷⁴ It does not follow that the right to respect for their family life of persons in need of protection is absolute: reunification or maintenance of family unity requested by a refugee may be denied for the reasons set out in Article 8(2) ECHR, the prevention of disorder and crime and so on. But we may assume that in cases of appeal to Article 8 ECHR where persons in need of international protection are involved, states do not enjoy a wide margin of appreciation.

Second, in cases of first admission of children, the circumstance that the parent "voluntarily" left the child in the country of origin occasionally figures as an important factor.⁷⁵ Obviously, this factor can, in principle, not be relied upon by the Member States in cases where the parent left the child in the country where he had a well-founded fear of persecution or ran a real risk of ill treatment.

[574] In summary, Article 8 ECHR may apply if the applicant "lives" or "resides" or has "settled status" in a Member State. "Family life" includes "genuine" marital as well as (certain conditions fulfilled) non-marital relationships, and the relation between parents and minor children. Respect for family life may warrant an obligation to abstain from expulsion of family members or to authorise their entry. In both cases, a fair balance must be struck between the state's and the applicant's interests. In general, important factors in this balancing are the possibility of enjoying family life in the alien's country of origin, and, in cases of reunification of children with parents, the circumstance

that the parents left the child voluntarily. Appeals to the obligation to admit family members could in general only rarely be successful, due to the wide margin of appreciation Member States enjoy in immigration matters. In contrast, neither of the two mentioned factors can be invoked by the state in cases of persons in need of international protection who appeal to respect for their family life with relatives in or from the country where they fear persecution or ill-treatment.

8.4 Refugee status

8.4.1 General

[575] The relation between Directive “refugee status” and entitlement to Refugee Convention benefits is quite straightforward. Qualification for “refugee status” pursuant to Article 13 QD entails by definition “recognition as a refugee”.⁷⁶ As this status entitles the beneficiary to a residence permit of three years,⁷⁷ these refugees are “resident” and “lawfully staying” for the purposes of the Refugee Convention.⁷⁸ Hence, Directive refugees are entitled to all Convention benefits.

Most benefits to which refugee status gives entitlement are laid down in Chapter VII QD and Articles 20 to 34 QD. The Family Reunification Directive confers claims as to family reunification (see further under 8.4.4). The legal basis for both sets of rules is Article 63(3)(a) TEC;⁷⁹ the relevant provisions must therefore be compatible with “international agreements” such as the Refugee Convention and Article 8 ECHR (cf. number [128]). According to Article 20(1) QD, “this Chapter shall be without prejudice to the rights laid down in the Geneva Convention”. As its provisions set minimum standards, they are by definition “without prejudice” to the Member States’ obligations under international asylum law (see number [258]). We should read the statement as a confirmation that interpretation and application of the relevant Directive provisions should be “compatible” with the Refugee Convention.

As to the personal scope of Chapter VII, all benefits (but one)⁸⁰ laid down in it apply to “beneficiaries of refugee status”, or some variant thereof,⁸¹ so avoiding implications for unrecognised refugees.⁸²

As observed under number [266], the Qualification Directive does not define in general its territorial scope. Nor do Articles 20 – 34 QD explicitly state such a limitation. But in several instances, it appears that limitation to the territory of the Member States is presupposed.⁸³ In particular, the Preamble

defines as the main objective ensuring “that a minimum level of benefits is available for these persons *in* all Member States” (emphasis added).⁸⁴ Furthermore, a reading in conformity with the Refugee Convention implies that the Member States may limit entitlement to the benefits laid down in Chapter VII to persons within their territory, where relevant Convention provisions contain a similar limitation. And the Directive seeks to establish “approximation of rules on [...] the content of refugee [...] status”.⁸⁵ Hence, only where it can be established that the Member States did hitherto entitle refugees abroad to benefits comparable to those laid down in the Directive, may it be reasonably assumed that it applies to refugees outside the territory of the Member States as well.

8.4.2 Refugee Convention benefits

[576] Refugee status beneficiaries (persons to whom refugee status must be granted according to Article 13 QD) are entitled to residence permits, which are valid for “at least” three years, and “renewable”.⁸⁶ The issue of a permit for permanent residence (i.e. of undefined duration) is not required, but implicitly assumed by Article 3(1) FRD, that addresses (*inter alia*) refugees as persons who have “reasonable prospects of obtaining the right of permanent residence”.

The grant of a residence permit to a refugee status beneficiary implies a right to remain. For the permit renders the refugee “lawfully present”, and the refugee status entails that he is recognised – the requirements for enjoying the benefits of Article 32 RC, protection from expulsion (see number [562]). Arguably, this right to remain is indirectly addressed by Article 21(1) QD that states that

“Member States shall respect the principle of non-*refoulement* in accordance with their international obligations.”

Thus, refugee status beneficiaries are in principle entitled to a residence permit, and hence in principle to the right to remain. In principle, for there are two exceptions.

First, pursuant to Article 21(3) read in conjunction with (2) QD the permit can be revoked or refused in case the grounds for making exception to the prohibition of *refoulement* ex Article 33(2) RC apply.⁸⁷ If the permit is withdrawn for this reason, the refugee ceases to be lawfully present, and therefore the protection of Article 32 RC would cease to apply.

Second, according to Article 24(1) QD the permit must be issued “unless compelling reasons of national security or public order otherwise require

[...]. This phrase arguably refers to Article 32(1) RC, which states that lawfully present recognised refugees may not be expelled, hence must be allowed to remain, “save on grounds of national security or public order”.⁸⁸ Hence, the residence permit may also be refused on the grounds mentioned in Article 32(1) RC, which is in accordance with the Refugee Convention – cf. number [561]. The refugee whom a residence permit is denied on this second ground may be entitled under the Qualification Directive to a special set of secondary rights – see below, paragraph 8.5.2.

[577] Other Refugee Convention benefits addressed by the Qualification Directive are those concerning travel documents,⁸⁹ employment,⁹⁰ education,⁹¹ welfare,⁹² health care,⁹³ accommodation⁹⁴ and freedom of movement.⁹⁵ Most of the relevant Refugee Convention provisions do not state “absolute”, but “relative” rights: they entitle refugees to treatment as accorded to nationals of the host state or some other group of reference. We may observe that where the Refugee Convention provisions require treatment “not less favourable than aliens generally”, their counterparts in the Qualification Directive require treatment “as third country nationals legally resident,”⁹⁶ and hence not the (eventually) more favourable treatment as nationals of other Member States. This reading of the mentioned Refugee Convention term seems correct, for treatment “as aliens generally” as meant in the Refugee Convention does not imply the most favourable treatment enjoyed by aliens on the basis of reciprocity, or accorded to specific groups of aliens by domestic law.⁹⁷ This follows from a reading in conjunction with the term “the most favourable treatment accorded to nationals of a foreign country in the same circumstances”, applied in Article 17 RC, on employment (quoted under number [544]).

Article 26 QD speaks of the right “to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service”, and is the counterpart to Article 17 RC as well as to Articles 18 and 19 RC as far as self-employed activities are concerned. The phrase “rules generally applicable” render the Convention expression “in the same circumstances”,⁹⁸ the requirement of treatment “as most favoured aliens”, in fact as nationals of other Member States, is hence not addressed.

As to the substantial scope of Qualification Directive benefits, we may observe that Articles 27 and 31 QD require “access to” education and accommodation instead of the indeterminate “treatment as regards to” these issues, as required by Articles 22 and 21 RC. According to Preamble recital (31) QD, “This Directive does not apply to financial benefits from the Member States which are granted to promote education and training.”

The latter benefits, though clearly within the scope of Article 22 RC, are hence outside the scope of Article 27 QD.

[578] A number of Refugee Convention benefits are not addressed in the Qualification Directive, such as the provisions on non-discrimination, freedom of religion, juridical status, administrative assistance and fiscal charges.⁹⁹ Maybe the subsidiarity principle precluded “guidance” on their “application”; maybe such guidance was felt to be unnecessary as general principles of Community law offer comparable protection (see, however, number [593]).

A few Qualification Directive benefits have no counterparts in the Refugee Convention: those on information on the status, on access to integration facilities and on assistance to repatriation.¹⁰⁰ Further, the Qualification Directive requires that when implementing Chapter VII QD, the Member States “take into account the specific situation” of *inter alia* (unaccompanied) minors, women and persons who suffered torture or rape.¹⁰¹ This obligation is further elaborated in Article 29(3) QD, stipulating that “adequate health care” be provided to refugee status beneficiaries with special needs, and in Article 30 QD, addressing unaccompanied minors in particular. Member States must provide such minors with a guardian, place them with “adult relatives”, foster families or in “suitable accommodation”, and endeavour to trace their family.¹⁰²

8.4.3 Family unity

Introduction

[579] Two sets of rules address residence and secondary rights of family members of refugees. The Qualification Directive addresses the maintenance of the family unity of the Directive refugee, and establishes a dependant status for family members of the refugee status beneficiary. The Family Reunification Directive addresses admission of family members of refugees.

It appears from the Preambles to the respective Directives that these arrangements serve (at least partially) different purposes. The primary aim of the Family Reunification Directive is securing respect for Article 8 ECHR.¹⁰³ The Qualification Directive does not make mention of Article 8 ECHR, or of respect for family life. Its Preamble to the Qualification Directive speaks of “the right to asylum of applicants and their accompanying family members”, and states that “Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status”.¹⁰⁴

Thus, the Qualification Directive addresses family members of refugees as persons in need of protection, which is remarkable as the Qualification Directive addresses family members who do not qualify for refugee status themselves.¹⁰⁵ As we will see, this approach is reflected in the conditions on entitlement to secondary rights for family members.

Below, I will first describe both arrangements, and then assess their “compatibility” with Article 8 ECHR, and with each other.

The Qualification Directive

[580] Pursuant to Article 23(2) QD, family members of Directive refugee status beneficiaries “are entitled to claim the benefits referred to in Articles 24 to 34” QD.¹⁰⁶ Thus, family members are entitled to almost the same set of benefits as refugees, including *inter alia* the right to a residence permit.¹⁰⁷ In fact, the provision establishes a dependant status for relatives of refugees.

To which relatives of the refugee must this status be granted? To begin with, the relative must qualify as “family member” of the refugee. The scope of “family members” is restricted by Article 2(h) QD to members of the “core family”: the refugee’s spouse and his (unmarried) minor children¹⁰⁸ and, if domestic aliens law treats “unmarried couples” in a way comparable to married ones, the refugee’s “partner in a stable relationship”.¹⁰⁹ It is further required that “the family already existed in the country of origin”.¹¹⁰ Thus, only family ties predating the refugee’s entry to the European Union count. Finally, the family members must be “present in the same Member State in relation to the application for international protection”.¹¹¹ Thus, spouses, partners or children who arrive after the status has been granted do not qualify as “family members” for the purposes of the Qualification Directive. But it is not required that they arrived together with the Directive refugee. If they arrive before the issue of the status, they would therefore be family members for the purposes of the Qualification Directive.¹¹²

The Qualification Directive also mentions three grounds of exclusion from the dependant status. First, the family member has no claim to the status if he “is or would be excluded from refugee status [...] pursuant to Chapter III [...]”,¹¹³ that is, if Article 1F RC does or would apply.¹¹⁴ Second, Member States “may” refuse, reduce or withdraw benefits “for reasons of national security or public order” – that is, when refugees may be expelled according to Article 32(1) RC (see above, number [576]).¹¹⁵ Hence, the grounds of exclusion from the dependant status are tailored to the grounds for exclusion from refugee status and the right to a residence permit of the refugee status beneficiary.¹¹⁶ Third, the obligation to grant the dependant status applies only “as far

as it is compatible with the personal legal status of the family member”.¹¹⁷ Arguably, such incompatibility occurs if the family member already enjoys a more favourable status.¹¹⁸

Finally, the Qualification Directive states that the family members should not “individually qualify” for refugee status.¹¹⁹ Arguably, this is not a condition, but rather a procedural rule: it imposes an order of application. If a family member of a refugee status beneficiary applies for refugee status, Member States cannot qualify him as family member and then dismiss the claim as inadmissible because he has “equivalent protection” to refugee status.¹²⁰ Further procedures on the grant or withdrawal of these secondary rights to the family member are left to domestic law.¹²¹

The Qualification Directive does not address cessation of the dependant status. Obviously, the dependant status ceases if the refugee status of the family member ceases. Arguably, the same holds true when the refugee dies or moves to another state – then, the dependant status holders are no longer “present in the same Member State” and hence no longer family members for the purposes of Article 2(h) QD. The same reasoning applies when the minor child of a refugee becomes of age (cf. number [588]).

[581] Hence, Member States must grant the dependant status to members of the core family of the refugee if that family already existed in the country of origin, if they are present in relation to his application for refugee status and if the grounds meant in Article 1F and 33(2) RC do not apply. They “may”¹²² extend the group of beneficiaries to “other close relatives who were together as part of the family” with the refugee in the country of origin, and who were “wholly or mainly dependant” on the refugee status beneficiary.¹²³ The dependant status entitles the family member (or dependant relative) to almost the same benefits as the Directive refugee.

The Qualification Directive contains yet another obligation on “maintaining family unity” next to the obligation to grant the dependant status. Article 23(1) QD requires that “Member States shall ensure that family unity can be maintained”.¹²⁴ What could be the meaning of this “benefit”¹²⁵ next to the obligation discussed above? There is one important benefit that the refugee’s “family members” cannot claim: Article 21 QD, the protection from refoulement.¹²⁶ We saw above that for refugee status beneficiaries, this provision functions as an implicit claim to a right to remain (see above number [576]). Arguably, Article 23(1) QD requires that persons who qualify for the dependant status are not separated from the refugee status beneficiary by expulsion (but they could be expelled if one of the grounds meant in Articles

32(1) or 33(2) RC applies – for then, they are no longer entitled to the dependant status).

The Family Reunification Directive

[582] The Family Reunification Directive addresses “conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States”.¹²⁷ “Family reunification” is defined as

“the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident’s entry”.¹²⁸

Those family members may have “whatever status”,¹²⁹ i.e., they may have no title for residence at all. Thus, in the terms of the relevant Strasbourg case-law on Article 8 ECHR, the Directive addresses “admission”, and might concern both the negative as well as the positive obligation under Article 8 ECHR (cf. number [572]).

Most provisions of the Family Reunification Directive (Articles 1-8 and 13–18 FRD) address requests for family reunification by any alien, refugees included (below referred to as the “general rules”). According to Preamble recital (8) FRD,

“Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification”.

Accordingly, Articles 9 to 12 FRD address “Family reunification of refugees” in particular.

[583] The alien lawfully residing in a Member State (the “sponsor”) must have a residence permit valid for one year or more, and have a view to a permanent residence status.¹³⁰ Refugees are explicitly included in the personal scope of the Family Reunification Directive.¹³¹ The instrument defines refugees as persons enjoying refugee status within the meaning of the Refugee Convention.¹³² The scope of “recognised refugees” is therefore broader than the scope of persons enjoying refugee status pursuant to the Qualification Directive: it applies to Qualification Directive refugee status beneficiaries, but also to persons who are “recognised” as Convention refugees on other grounds than those mentioned in the Qualification Directive.

The Member States must (other conditions fulfilled) reunite the sponsor

with his spouse and the minor children of the sponsor and spouse.¹³³ Entry of adopted children of the sponsor or the spouse must be authorised only when the sponsor or spouse has custody and the child is dependant upon him or her; the same conditions apply to other children of the spouse.¹³⁴ The age of majority relevant for these provisions is set by national legislation.¹³⁵ As to refugees, the Directive states in addition the obligation to reunite unaccompanied minor refugees under eighteen with “first degree relatives in ascending line”, his parents.¹³⁶

The Member States “may”¹³⁷ authorise entry and residence of a slightly broader scope of relatives of refugees. If the recognised refugee is a minor, reunification may take place with his legal guardian “or any other member of the family”.¹³⁸ If the refugee is an adult, Member States may reunite him or her with an unmarried partner, if they have a “duly attested long-term relationship” or a “registered partnership”.¹³⁹ Further, reunification with an adult refugee may take place with the parents of the refugee or his or her spouse or unmarried partner, if those parents are dependent on them, as well as with adult children of the refugee or of his or her spouse or unmarried partner, if those children “are objectively unable to provide for their own needs on account of their state of health”.¹⁴⁰

[584] The Member States “may reject” applications for family reunification with family members relatives who present a threat to public order, national security or public health.¹⁴¹ We may observe that the latter ground does not figure as a ground for refusal of a residence permit under Article 23 read in conjunction with 24 QD (see paragraph 6.4). Member States may withdraw or refuse to renew the family member’s residence permit on the same grounds, but then Member States must consider

“the severity or type of offence against public policy or public security committed by the family member, or the dangers that are emanating from such a person”.¹⁴²

Both in case of rejection of a first application as well in cases of withdrawal or refusal of renewal, Member States must

“take due account of the nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin”.¹⁴³

Further, if the request for family reunification is lodged within three months of the granting of refuge status, Member States cannot require that the refugee has sufficient accommodation, insurance and regular resources, but after three months they can.¹⁴⁴ “Without prejudice to international obliga-

tions”, these requirements may moreover be applied when reunification is possible in a third country.¹⁴⁵ Indeed, if the refugee has no fear of being persecuted in or of indirect *refoulement* from that third country, there are no “major obstacles” due to his particular predicament that block family life there.

[585] The Family Reunification Directive also addresses secondary rights of family members. Family members who qualify for reunification under the Family Reunification Directive are entitled to a residence permit valid for at least one year, and renewable; after five years, the family member is entitled to an autonomous residence permit.¹⁴⁶ They are further entitled “in the same way as the sponsor” to access to education and vocational training, and to (self-)employment.¹⁴⁷ But domestic law may restrict access to (self-)employment for any category of family members for one year, and for certain categories also thereafter.¹⁴⁸

Finally, the Directive addresses procedural issues. Member States may reject an application, withdraw a residence permit or refuse to renew it in case of fraud, end of the relationship (before the family member is entitled to autonomous status) and change of circumstances.¹⁴⁹ It is left to domestic law whether the request should be submitted by the sponsor or by the family member.¹⁵⁰ In principle, the application must be submitted and examined when the family members are still outside the territory of the Member State.¹⁵¹ Any application must be accompanied by documentary evidence of the family relationship, but in cases of refugees, “other evidence [...] of the existence of such a relationship” must be taken into account, “to be assessed in accordance with national law”.¹⁵² Eventually, interviews may be carried out.¹⁵³

A decision must be taken within nine months of application; this time limit may be extended only in “exceptional circumstances”.¹⁵⁴ Decisions must be in writing, and state the reasons for rejection.¹⁵⁵ Negative decisions should be open to a “legal challenge”.¹⁵⁶

Assessment

[586] When comparing this arrangement with relevant obligations under Article 8 ECHR, we may observe that the Family Reunification Directive recognises the right to family reunification with spouses and with minor children arising from that relationship, as required by Article 8 ECHR. The condition that minor children from an earlier marriage of the spouse are dependant upon that spouse does not run counter to Article 8 ECHR; the possibility of such children staying with the ex-partner of the spouse is a materi-

al consideration for the European Court of Human Rights.¹⁵⁷ We saw that Article 8 ECHR does not, “in principle”, require reunification with other relatives than those belonging to the core family, but that a situation of dependency might imply otherwise (see number [571]). In the absence of more specific guidelines, it is not surprising that the Directive only states that reunification “may” take place in a number of such situations. We may finally observe that the Family Reunification Directive does not codify the case law on non-marital relationships that qualify as family life under Article 8 ECHR, but leaves the matter to the Member States. The Qualification Directive secures observance of Article 8 ECHR for a smaller scope of family members than the Family Reunification Directive, which raises the question of how the two instruments relate (see number [589] below).

[587] The circumstances that warrant special conditions for family reunification of refugees are the impossibility of leading a normal family life in their country of origin. This circumstance is relevant also for the balancing of the interest in family life to the legitimate interests of the state, referred to in Article 8(2) ECHR, such as public order. Although this circumstance is not mentioned in either Article 6 or Article 17 FRD, it should arguably be taken into account when balancing interests in case of refusal or withdrawal. The same holds true for application of the competence to exclude family members from Qualification Directive benefits (Article 23(3) and (4) QD, see number [580] above).

The same consideration applies to refusal of family reunification in case the recognised refugee can not afford sufficient reception conditions (Article 12(1) FRD). Although the time span that lapsed between the issue of the residence permit to the sponsor and the request for family reunification is a material factor for the application of Article 8 ECHR, the limit of three months set in Article 12(1) FRD seems unduly strict.¹⁵⁸ This holds true especially when it comes to the possibility of the refugee obtaining the requisite means of subsistence and suitable accommodation. Finally, we may observe that that Member States may confine the special standards for refugees set out in Articles 10, 11 and 12 FRD to relationships that predate their entry.¹⁵⁹ But the circumstances that warrant special treatment of request for family reunification with refugees could equally apply to later relationships. In summary, the Family Reunification Directive fails to fully grasp the content and extent of the way that factors relevant for application of Article 8 ECHR are informed by the refugee’s particular circumstances.

[588] When comparing the arrangements on family unity for refugees laid down in the Qualification and the Family Reunification Directive, the scope of the latter appears to be wider than that of the former in several respects. To begin with, the Family Reunification Directive addresses next to the maintenance of family ties (i.e. rules on withdrawal or refusal of renewal of residence permits of family members), first and foremost obligations on the admission of family members. Secondly, the Family Reunification Directive imposes obligations on the family unity of any recognised Convention refugee, the Qualification Directive addresses only Directive refugees. Thirdly, for the purposes of the Family Reunification Directive more relationships qualify as “family life” than under the Qualification Directive. Fourthly, the Family Reunification Directive states some procedural guarantees, which matter is left unregulated by the Qualification Directive. Fifthly, the Family Reunification Directive entitles family members to an autonomous residence permit after five years’ residence.

The Qualification Directive offers more protection in two respects: it entitles the family member to more secondary rights, and the grounds for refusal and withdrawal are stricter.

[589] The differences noted above beg the question of whether or when family members of refugees can invoke the instruments. To begin with, could family members within the scope of the Family Reunification Directive invoke benefits of the Qualification Directive? They are not entitled to the dependant status established by Article 23(2) QD, as they cannot qualify as a “family member” for the purposes of the Qualification Directive: they are not present in the Member State “in relation to the application for international protection” (cf. number [580] above). But arguably, they could invoke Article 23(1) QD, that requires that “Member States shall ensure that family unity can be maintained”. As the term “family” is not defined in the Qualification Directive, the provision can apply also to relatives who do not qualify as “family members” pursuant to Article 2(h) QD.

In which circumstances could Article 23(1) QD be relevant? We may observe that children born in wedlock and adopted children from a previous relationship of the refugee or his spouse are “family members” for the purposes of the family Reunification Directive,¹⁶⁰ but not for those of the Qualification Directive.¹⁶¹ Thus, also if such children accompanied the refugee when he lodged his application (were “present in relation to the application”), they are not entitled to the dependant status. Article 23(2) Qualification Directive hence allows for their expulsion. But the same Member State would

have the obligation to (re)admit them upon request for family reunification. Arguably, Article 23(1) QD prohibits expulsion in such cases (cf. number [581]).¹⁶²

Further, we saw above that the application for reunification must be submitted and examined when the family members are still outside the territory of the Member State, but “in appropriate circumstances” Member States may deal with requests concerning family members already present.¹⁶³ Arguably, Article 23(1) QD requires that in case the request for family reunification is lodged while the family member is already present in the refugee’s host state, it should make use of the competence.

8.4.4 Concluding remarks

[590] Refugee status beneficiaries are entitled to all benefits laid down in Articles 2 to 34 RC. The Qualification Directive addresses a number of those benefits, and prescribes implementation in a way that seems compatible with the Refugee Convention. One Qualification Directive provision however suggests application running counter to the Refugee Convention. According to Article 20(6),

“Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee”.

But “reduction” of benefits on the mentioned ground cannot take place “within the limits set out by” the Refugee Convention.¹⁶⁴ Once a refugee *sur place* (cf. number [335]) has been recognised and is lawfully staying, he is entitled to all Refugee Convention benefits. Reduction of benefits pursuant to this provision is therefore not compatible with the Refugee Convention. But apart from Article 20(6) QD, Chapter VII QD faithfully implements the Refugee Convention provisions on secondary rights, and adds a few obligations on treatment of refugee status beneficiaries.

[591] The predicament of refugees informs application of the right to respect for their family life ex Article 8 ECHR, as fear of persecution constitutes an obstacle to leading a normal family life in their country of origin, and risk of indirect *refoulement* constitutes an obstacle to leading a family life in a third country (par. 8.3). The Family Reunification Directive therefore contains

“more favourable conditions” for family reunification by refugees (number [582]). In particular, it states that Member States should not require that the refugee has sufficient accommodation, sickness insurance and sufficient income (number [584]). But Member States are not required to apply this lenient standard to applications for reunification that are lodged more than three months after the refugee status was granted, or if the family ties date from after his entry into the host state. However, in both situations the refugee’s fear of being persecuted is an obstacle to leading a family life in the country of origin (or in an unsafe third country), that warrants application of “more favourable conditions”.

We further noted some differences in personal scope and content between the arrangements on family life in the Qualification and in the Family Reunification Directive (see number [588]). A legal or policy justification for these divergences is hard to imagine. The definition of family members in the Qualification Directive owes its present scope to the suggestion of some Member States to “align [it] with the one in the Draft [Receptions Standards Directive]”¹⁶⁵ which eventually happened,¹⁶⁶ but apparently without taking any notice of the scope of family members with whom refugees should be reunited according to the (earlier adopted) Family Reunification Directive.

8.5 Alternative refugee statuses

In the previous paragraph, I discussed the benefits to which “refugee status beneficiaries” are entitled. It concerned persons to whom according to Article 13 QD “refugee status” must be granted. Next to these “refugee status beneficiaries”, we can distinguish yet two other categories of refugees in European asylum law: Convention refugees who are, under the Qualification Directive, not entitled to the same benefits as “refugee status beneficiaries”, but to separate sets of secondary rights. I will discuss these two other “statuses” below.

8.5.1 Article 14(6) QD refugee status

[592] We have already encountered the first of these two categories in paragraph 5.6.2, where it was labelled the “Article 14(6) QD status”. We saw that a person who fulfils the requirements of Article 1 RC as interpreted by the Qualification Directive (“who qualifies as a refugee in accordance with

Chapters III and IV”) is entitled to “refugee status”, pursuant to Article 13 QD. There is one exception: the “refugee status” meant in Article 13 QD may be revoked or refused to a person to whom Article 14(4) QD applies, that is, to whom the exceptions to the prohibition of *refoulement* ex Article 33(2) RC apply.¹⁶⁷ This person is therefore not a “refugee status beneficiary” as meant in Article 13 QD, but he is a “refugee” for the purpose of the Refugee Convention. If it has been established that he qualifies as refugee, he is, moreover, a “recognised refugee” for the purposes of the Refugee Convention.¹⁶⁸

As Article 33(2) RC applies, this person can be expelled in accordance with the Refugee Convention. But the other prohibitions of *refoulement* may block expulsion. Then, the Convention refugee is present on the territory of the Member State, hence entitled (under international law) to all Refugee Convention provisions that apply to unrecognised refugees *tout court*¹⁶⁹ or, after three months presence, to resident refugees *tout court*.¹⁷⁰ But this Convention refugee is not a Directive “refugee status beneficiary” (as meant in Article 13 QD); therefore, he cannot claim the benefits set out in Chapter VII which apply to Directive refugees – see number [575]).

[593] Apparently in order to secure that this category of Convention refugees is treated in accordance with the Refugee Convention, Article 14(6) QD establishes a “status” for them, that is, stipulates that these Convention refugees are indeed entitled to certain Refugee Convention benefits, namely to

“rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 RC”.

Bearing in mind that Directive refugee status does not address all Convention benefits explicitly, it is not surprising that Article 14(6) QD does not mention all the relevant Convention benefits (cf. number [569]). We may observe that Articles 3 and 4 RC, on non-discrimination and religion, are not addressed in Chapter VII QD. In this respect, the legal position of refugees meant in Article 14(6) QD is therefore, surprisingly, stronger than that of Directive refugee status beneficiaries. Further, Article 14(6) QD mentions Article 32 RC as well, a provision that applies only to recognised lawfully present refugees (Article [562]). The Qualification Directive does not imply that the concerned refugees are “lawfully present” (although it does not prohibit Member States from granting a permit to them). Arguably, this reference should be read as a confirmation that the requirements of Article 32(2) RC apply to the withdrawal of the refugee status of these refugees, where appropriate.¹⁷¹ Article 33 RC has little practical meaning for refugees who may be expelled pursuant to Article 33(2) RC.¹⁷² In practice, then, the right to access to education (Article 22 RC)

and the restrictions on penalties for illegal entry and on detention set out in Article 31 RC, seem most meaningful.

Finally, we should address the question of whether this category of refugees could rely on the prohibition of *refoulement* laid down in Article 21(1) QD (see number [576]). The provision forms part of Chapter VII, headed “Content of international protection”; the latter term refers to “refugee (and subsidiary) protection”, that is (as far as is relevant here), “recognition as a refugee”.¹⁷³ It would follow that the unrecognised refugees addressed by Article 14(6) QD fall out of the scope of the Chapter, and hence of Article 21 QD. But Article 21(2) QD implies that unrecognised refugees do fall within its scope, where it states that “[w]here not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, *whether formally recognised or not* [...] emphasis added, HB.” Protection of the refugees addressed by Article 14(6) QD from *refoulement* would further serve the purpose of the Qualification Directive to “ensure that a minimum level of benefits is available for [persons genuinely in need of international protection].”¹⁷⁴ Arguably, Article 21(1) QD therefore applies to the Convention refugees meant in Article 14(6) QD.

8.5.2 Article 24(1) QD refugee status

[594] The second category of Convention refugees who are not entitled to all benefits discussed in paragraph 8.4.2, but who are entitled to certain benefits under the Qualification Directive, is the product of the grounds for refusal of a residence permit stated in Article 24(1) QD. We saw above (number [576]) that Article 24(1) entitles Directive refugees (“refugee status beneficiaries” as meant in Article 13 QD) to a residence permit. We further saw that there are two exceptions, or grounds for refusal of the permit. First, pursuant to Article 21(3) read in conjunction with 2 QD, the permit may be refused to Directive refugees to whom Article 33(2) RC applies. If these grounds apply, the Directive refugee status could be revoked or refused as well, and the Convention refugee is entitled to the Article 14(6) QD refugee status, discussed in the previous paragraph.

The second grounds for refusal of the permit are stated in Article 24(1) QD, and concern “compelling reasons of national security or public order”. These grounds refer to the grounds for expulsion stated in Article 32(1) RC (see number [576]). Arguably, the scope of these “compelling grounds” is wider than the scope of Article 33(2) RC, which applies when there are “reasonable grounds to consider [the refugee] as a danger to the security of the country in

which he is” and when a refugee “having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”. The grounds for expulsion meant in Article 33(2) RC are hence instances of the grounds mentioned in Article 32 RC, which encompasses yet other cases.¹⁷⁵ It appears that the Qualification Directive legislator holds the same view, as Article 24(1) QD states that those compelling reasons apply “without prejudice to Article 21(3)”.¹⁷⁶

[595] Hence, there is a category of refugees whose residence permit may be revoked for a “compelling reason”, but who are not a danger to the security or community of the host state (as meant in Article 33(2) RC) – here referred to as “Article 24(1) QD refugees”. These refugees are still refugee status beneficiaries: they are entitled to Directive “refugee status” pursuant to Article 13 QD, as the grounds of refusal ex Article 33(2) RC (Article 14(4) QD) do not apply. As unlawfully present Convention refugees, they could be expelled to a third country, but expulsion to their country of origin is prohibited by Article 33 RC (as they do not pose a “danger” as meant in Article 33(2) RC). It would appear that if they are not expelled, they would be entitled to the same Qualification Directive benefits as refugees who are in possession of a residence permit. For the relevant Directive provisions apply to “refugee status beneficiaries” (cf. number [575]). According to the Preamble, the prior issue of the permit may be required with regard to access to employment, social welfare, health care and access to integration facilities.¹⁷⁷ But if the prior issue of the permit were to function as a condition for entitlement to Qualification Directive benefits, it should have been laid down in the provisions of the instrument, not in a Preamble consideration.¹⁷⁸

Hence, refugees to whom a residence permit may be refused for “compelling reasons of national security or public order”, are entitled to the benefits laid down in Articles 24 to 34 QD. Their status differs from the ‘ordinary’ Directive refugee status as discussed in paragraph 8.4.2 in the following respects. To begin with, we observed that Article 24(1) QD refugees can be expelled to a safe third country (number [576]). Further, as they do not possess a residence permit, they have no claims to family reunification pursuant to the Family Reunification Directive: only “lawfully residing” third country nationals do (cf. number [583]). Finally, the benefits of Article 23 QD (dependant status for the Directive refugee’s family members who are present in the host Member State) may be refused “for reasons of national security or public order”. Arguably, this exclusion ground is worded sufficiently broadly to apply not only in case the family member threatens the national security or public

order, but also if the refugee does. Hence, the refugee status beneficiaries to whom no residence permit is issued for the “compelling reasons” meant in Article 24 QD, are entitled to yet another set of benefits, and hence in fact constitute another CEAS protection status.

8.6 Subsidiary protection status

Subsidiary protection and refugee protection

[596] According to Article 2(e) QD, subsidiary protection status beneficiaries do not, by definition, qualify as refugees, and hence fall out of the scope of the Refugee Convention (cf. numbers [275] and [354]). The Qualification Directive does not state a clear alternative standard for the secondary rights of subsidiary protection beneficiaries laid down in Chapter VII. The status should be “appropriate” and the secondary rights should ensure availability of “a minimum level of benefits”, and cater for “approximation of rules”,¹⁷⁹ which suggests that they are inspired by state practice. But in fact, the secondary rights of subsidiary protection status beneficiaries appear to be mostly inspired by those of refugee status beneficiaries, and hence partially by the Refugee Convention.

Indeed in general, Chapter VII provisions “shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated”.¹⁸⁰ Without distinction apply Articles 21(1) (on non-*refoulement*), 22 (on information), 27 (on access to education), 30 (on unaccompanied minors), 31 (on access to accommodation), 32 (on freedom of movement within the Member State) and 34 (on repatriation). The remaining provisions of Chapter VII define a lower level of benefits for subsidiary protection status beneficiaries.

[597] Why would a lower standard for subsidiary protection beneficiaries be “appropriate”? For some benefits, an explanation may be that the Community legislator holds that the need for subsidiary protection is less durable than the need for refugee protection. Article 24(2) QD states that subsidiary protection status beneficiaries are entitled to (renewable) residence permits with a validity of only one year (not three years as for refugees), “unless compelling reasons of national security or public order otherwise require”.¹⁸¹ And where Member States must provide integration programmes for refugees, subsidiary protection status beneficiaries must be granted access to those programs only “where it is considered appropriate by Member States.”¹⁸²

Does it indeed follow from the criteria for qualification that the need for

subsidiary protection is inherently less durable than the need for refugee protection? Arguably, there is no reason for holding so where protection from death penalty or ill-treatment (Article 15(a) and (b) QD) is concerned. Maybe the idea that subsidiary protection is less durable than refugee protection is prompted by the type of serious harm meant in Article 15(c) QD – threat to life or person due to indiscriminate violence in case of (civil) war. This type of harm addresses situations that are, to a fair extent, similar to situations where temporary protection would be offered (cf. number [306]). We should observe that the predecessor of Article 15(c) QD also turns up in the explanation in the Comments on Articles of why travel documents must be issued to subsidiary protection status beneficiaries only if they are unable to obtain a national passport from their consular authorities¹⁸³ (a condition that does not apply to refugees):

“Beneficiaries of subsidiary protection may be in a position to apply for and to receive a travel document from the consular authorities of their country of origin or ordinary residence (e.g. when these authorities are able to continue their work even if *in the country* they represent there *is a situation of widespread generalised and indiscriminate violence arising from armed conflict*) [emphasis added, HB]”.¹⁸⁴

Consequently, proper functioning of consular authorities is connected to the situation of indiscriminate violence arising from armed conflict, i.e. Article 15(c).¹⁸⁵

Arguably, for some other provisions the reason for introduction of a lower standard for subsidiary protection benefits has to do with (societal) costs. Thus, whereas refugees are entitled to “the necessary social assistance as provided to nationals”,

“Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals”.¹⁸⁶

Likewise, health care may be limited to “core benefits”.¹⁸⁷ Conditions on access to employment related education for subsidiary protection status beneficiaries are “to be decided by the Member States”.¹⁸⁸ As to access to employment, Article 26(3) QD states that

“Member States shall authorise beneficiaries of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. The situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of

time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market”.

The first clause is identical to Article 26(1) QD, on access to employment for refugees. But it appears from the second clause that other groups may be granted priority over subsidiary protection beneficiaries.

Family unity

[598] Societal costs may also explain why the Qualification Directive has less favourable rules for family members of subsidiary protection, than for those of refugee status beneficiaries. The definition of family members of subsidiary protection status beneficiaries and the grounds for termination of entitlement to benefits of such a family member are the same as apply to refugee status.¹⁸⁹ Like family members of refugee status beneficiaries, those of subsidiary protection status beneficiaries are entitled to claim the benefits of Articles 24 to 34 QD.¹⁹⁰ But Member States “may define the conditions applicable to such benefits”; “[i]n these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living”.¹⁹¹ So after all, the “claim” to the benefits attached to the dependant status of family members of subsidiary protection beneficiaries may be subject to any requirement that the Member States think fit - as long as the standard of living remains “adequate”.¹⁹²

Subsidiary protection beneficiaries are explicitly excluded from the scope of the Family Reunification Directive.¹⁹³ The rationale behind this difference in treatment of refugees and subsidiary protection beneficiaries is, it seems, that refugees are considered to “have reasonable prospects of obtaining the right of permanent residence”, and subsidiary protection beneficiaries have not.¹⁹⁴ It appears from the case-law of the European Court of Human Rights on Article 8 ECHR that possession of a temporal rather than a permanent residence permit is a material, though not a decisive, factor when considering a request for family reunification.¹⁹⁵ Hence, subsidiary protection beneficiaries may certainly be entitled to family reunification pursuant to Article 8 ECHR. European asylum law leaves the matter entirely to domestic legislation.

Concluding remarks

[599] The Qualification Directive bestows upon subsidiary protection beneficiaries a number of secondary rights that seem inspired by the Refugee

Convention. The level of benefits is lower than of those attached to Directive refugee status, presumably in order to limit societal costs of reception and because subsidiary protection is conceived of as inherently less durable than refugee protection. Arguably, the latter contention may be true only as to subsidiary protection from indiscriminate violence as meant in Article 15(c) QD. The difference in treatment is particularly conspicuous where it comes to family members. The “conditions” for entitlement to secondary rights of family members of subsidiary protection beneficiaries are not defined. The Family Reunification Directive does not secure a right to family reunification of such beneficiaries. In summary, the “content” of subsidiary protection status is far from equivalent to that of Directive refugee status.

8.7 Applicant status

[600] The discussion of secondary rights of applicants involves several instruments. Benefits for applicants are laid down mainly in the Reception Standards Directive, and a few in the Procedures Directive; further the allocation criteria laid down in the Dublin Regulation may function in claims for preservation of family unity.

The personal scope of “applicants for asylum” was discussed under number [262]. The status ends when a final decision on the application has been taken which is no longer subject to appeal. The Reception Standards Directive benefits apply to applicants only “as long as they are allowed to remain on the territory as asylum seekers”.¹⁹⁶ Pursuant to Article 6(1) PD, applicants are allowed to remain during examination at first instance (hence not when the safe third neighbouring country exception applies, see number [405]), unless they are extradited (see number [393]). The Procedures Directive leaves the right to remain during appeal proceedings and after a decision not to re-open a case after (implicit) withdrawal, to domestic legislation (see numbers [425] and [402]). It appears that if the applicant is allowed to remain pursuant to domestic law (or to a decision by the appeal authority), he remains (or is again) entitled to Reception Standards Directive benefits.

8.7.1 Entitlement to Refugee Convention benefits

[601] Are applicants entitled to Refugee Convention benefits? Applicant status applies to persons who requested protection from a Member State under

the Refugee Convention,¹⁹⁷ hence to persons who state that they are Convention refugees. If it turns out that the application is well-founded, the Directive refugee status must be granted to him (Article 13 QD, see number [274]). The alien becomes a recognised refugee for the purposes of the Refugee Convention by the grant of this status. We saw above that many Refugee Convention provisions apply not only to recognised, but also to unrecognised refugees. Hence, before the grant of the Directive refugee status, although still being an applicant, the alien was already entitled to the benefits laid down in those provisions. In order to comply with its obligations under the Refugee Convention, the Member State should therefore have treated this alien when he was an applicant as a (unrecognised) refugee. As the Member States do not know beforehand which applicants will turn out to be refugees and which won't, they must treat all applicants in accordance with relevant Refugee Convention standards. In other words, applicants are entitled to Refugee Convention benefits that apply to refugees *tout court*.

Certain conditions fulfilled, applicants can also claim Refugee Convention benefits that apply to unrecognised lawfully present, lawfully staying and residing refugees. We saw above (number [548]) that a refugee is “lawfully present” for the purposes of the Refugee Convention when his presence is “authorised”, that is, when he received a title for presence in accordance with the law. If the refugee enters on a valid visa or some other title for presence in accordance with the Member State’s domestic law, he is “lawfully present” for the purposes of the refugee Convention.

Often however, applicants do not possess such a title. Does European asylum law provide such applicants with a claim that their presence is “authorised”? The fact that an applicant is allowed to stay during asylum proceedings does not render his presence lawful. According to Article 6(1) of the Procedures Directive (cf. number [392]), applicants are “allowed to remain in the Member State, for the sole purpose of the procedure” until a decision at first instance is taken, but “[t]his right to remain shall not constitute a residence permit”. The provision serves to secure that applicants are treated in accordance with (*inter alia*) Article 33 RC, that applies to refugees who are not lawfully present. Hence, observance of this prohibition of *refoulement* does not, in itself, imply that the refugee’s presence is “authorised”, or “lawful” for the purposes of the Refugee Convention.

Arguably however, it follows from Article 6(1) of the Reception Standards Directive that a certain category of applicants is lawfully present. The provision requires that “within three days after an application is lodged with the competent authority”, applicants receive a document “certifying his or her sta-

tus as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State". The right to obtain this document is subject to three exceptions, that apply when applications are examined in "a procedure to decide on the right of the applicant legally to enter the territory of a Member State", applications examined at the border and applicants in detention.¹⁹⁸ Thus, the document is denied to applicants who are not lawfully present. Arguably, the issue of the document that testifies that the applicant's stay is allowed, amounts to "regularisation". Hence, applicants who possess this document are "lawfully present" for the purposes of the Refugee Convention, and entitled to the Convention benefits that apply to unrecognised "lawfully present" refugees. After three months of lawful presence, they are also entitled to benefits that apply to unrecognised "lawfully staying" refugees. All applicants (lawfully present or not) can after three months presence claim the Convention benefits for "residing" refugees.

[602] It therefore follows from a reading in accordance with international law that applicants are entitled to certain Refugee Convention benefits. Does European asylum law acknowledge this entitlement?

The Treaty on European Community at least allows for, and arguably even suggests that the conclusion that the Refugee Convention applies to applicants, thus acknowledges the refugee status of applicants. As "reception conditions of asylum seekers" are mentioned under 63(1) TEC, they are an aspect of "asylum" and must be "in accordance with" the Refugee Convention and other relevant treaties. It should be noted that the reception conditions could also have been placed under Article 63(2) TEC, in which case accordance with the Refugee Convention would not have been explicitly required.

Secondary European asylum law is ambiguous on the matter. On the one hand, Preamble recital (14) of the Qualification Directive states clearly that "[t]he recognition of refugee status is a declaratory act". It follows from Article 21(2) read in conjunction with (1) QD that the exceptions to the prohibition of *refoulement* of Article 33(2) RC apply to "a refugee, whether formally recognised or not". The provision presupposes that the prohibition of *refoulement* itself (Article 33(1) RC) applies to unrecognised refugees. Article 14 QD also expresses a declaratory understanding of refugee status determination. Pursuant to Article 14(5), persons who qualify for Directive refugee status pursuant to Article 13 QD (i.e. persons who fulfil the refugee definition) may be denied the status (that is, "recognition as a refugee"). But according to Article 14(6) QD, these "persons" or unrecognised refugees are entitled to certain Refugee Convention benefits.¹⁹⁹ Likewise, the Procedures

Directive in several instances explicitly states that the protection from *refoulement* ex Article 33 RC applies to applicants²⁰⁰ - quite in conformity with Article 21 QD. All this implies a declaratory understanding of recognition of refugee status, which entails that applicants are entitled to relevant Refugee Convention benefits.

But on the other hand, the Reception Standards Directive contains no allusions or references to the same extent. In particular, no reference to the Refugee Convention is made in this instrument. The Preamble states that the Directive “respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.”²⁰¹ But the “right to asylum” addresses the right to “international protection”, not necessarily entitlement to Convention benefits (number [149] above).

Thus, whereas European asylum law acknowledges the declaratory nature of recognition of refugee status and in particular explicitly acknowledges the applicability of the prohibition of *refoulement* to all unrecognised refugees, applicants included, it does not explicitly acknowledge that applicants for asylum are entitled to other Refugee Convention benefits as well. In itself, this does not affect the conformity with the Refugee Convention. What matters is the level of protection that the instruments require.

8.7.2 Reception standards

8.7.2.1 (Un)lawful presence, illegal entry and the freedom of movement

Under the Refugee Convention as well as under the Reception Standards Directive the issues of “lawful presence”, illegal entry and leave to enter, detention and freedom of movement are closely connected. They are therefore addressed together. I will first discuss relevant international law and then the relevant provisions of European asylum law on these matters.

International law

[603] Article 31 RC (quoted under number [546]) addresses two forms of restrictions on the freedom of movement, which apply to two different categories of “unlawfully present” refugees. First, refugees who came “directly” from a country where they feared persecution, and who did, further, report

“without delay” to the authorities and can show “good cause” for their illegal entry. These refugees may not be penalised (for example, by detention) for their illegal entry or presence (Article 31(1) RC), but their freedom of movement may be restricted if “necessary” (Article 31(2) RC). Second, it follows from Article 31(1) RC that the Contracting states may impose penalties, such as detention, for illegal entry on refugees who do not fulfil one of the above-mentioned requirements (unlawfully present refugees who did not come directly from a persecution state, or refugees who do come from such a state, but did not report themselves or could not show good cause for their illegal entry). Goodwin-Gill argues that a reading in conformity with relevant international law implies that detention should not be arbitrary; a reading of the provision to object and purpose and in the light of relevant international law would imply, that detention should be “reasonable” and “proportional” to certain aims.²⁰² An ExCom Conclusion from 1986 contends that

“in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.”²⁰³

It seems that this view is confirmed by some domestic case law.²⁰⁴

Once the refugee’s presence is “regularised”, no restrictions on the freedom of movement are allowed. For according to Article 26 RC, “lawfully present” refugees enjoy freedom of movement, subject to the regulations that apply to aliens generally.²⁰⁵

[604] Further conditions on detention of applicants follow from international human rights law. Article 5(1)(f) ECHR allows for detention only (as far as relevant for the present purposes)

“if the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

The European Court of Human Rights has observed that deprivation of liberty in the context of asylum procedures is in accordance with Article 5 ECHR only under certain conditions: it “should not be prolonged excessively”, and “must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status”.²⁰⁶

European law

[605] According to Article 7(3) RSD,

“When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.”

This “confinement” can amount to detention, according to the definition of “detention” by the same Directive as

“confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.”

Thus, “confinement” pursuant to Article 7(3) RSD may fall within the scope of Article 5 ECHR.²⁰⁷

How does this confinement or detention compare to the Refugee Convention? In general, a refugee must “conform to [the] laws and regulations [of his host state] as well as to measures taken for the maintenance of public order”.²⁰⁸ But Article 7(3) RSD presupposes national law that applies specifically to applicants. Pursuant to Article 26 RC, unrecognised “lawfully present” refugees (including lawfully present applicants) enjoy freedom of movement, subject only to regulations “generally applicable in the same circumstances”. Arguably, confinement that specifically applies to applicants would be at variance with this provision. Hence, it follows from a reading of Article 7 RSD in accordance with the Refugee Convention that lawfully present applicants may not be subjected to this confinement.

As far as the “legal reasons” in Article 7(3) RSD concern illegal entry, the confinement must comply with Article 31 RC – it must be reasonable and proportionate to the aims pursued (see number [603]). Another restriction on national law allowing for such confinement follows from Article 17 PD:

“Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum”,
which would indeed amount to “arbitrary detention”, prohibited by 5 ECHR.

[606] Article 7 RSD also addresses some less drastic restrictions on the freedom of movement:

1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.
2. Member States may decide on the residence of the asylum seeker for

reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.”

The provision addresses “asylum seekers” in general, and hence includes both lawfully and unlawfully present refugees. It follows from Article 26 RC (see the previous number) that Member States may restrict the freedom of movement of “lawfully present” applicants to “an area assigned to them”, or decide on their place of residence only if their regulations generally do so.

The Refugee Convention does not resist application of these restrictions on the freedom of movement of unlawfully present refugees. But application to refugees who came directly from a persecution state (and presented themselves without delay to the authorities of the host state, and showed a good cause for their illegal entry) is allowed only if “necessary” the (Article 31(2) RC).

According to Article 7(5) RSD,

“Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 4 and/or the assigned area mentioned in paragraph 1.”

Does the provision secure that the decision on residence ex Article 7(2) does not constitute “deprivation of liberty”? In *Amuur*, the Court indicated that both the length of confinement and the degree of restriction of the freedom of movement were relevant factors for deciding thereupon.²⁰⁹ Article 7(5) RSD does not state when or how often permission to leave “the place of residence” must be granted. Arguably, whether “confinement” as meant in Article 7(3) RSD amounts to “deprivation of liberty” for the purposes of Article 5 ECHR cannot therefore be stated in the abstract, but only on the basis of implementation.

8.7.2.2 Other reception standards

Material reception conditions

[607] The Reception Standards Directive draws a distinction between ‘residence conditions’ at large, i.e. “the full set of measures that Member States grant to asylum seekers in accordance with this Directive”²¹⁰ and the sub-category of “material reception conditions”.

Material reception conditions are “the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance.”²¹¹ These material reception conditions must be “available to applicants when they make their application for asylum.”²¹² Provision of the material reception conditions may be made “sub-

ject to actual residence by the applicants in a specific place, to be determined by the Member States”.²¹³

Material reception conditions must meet a material standard. They must “ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence”.²¹⁴ Member States may choose to provide them

“in kind, or in the form of financial allowances or vouchers or in a combination of these provisions. Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined in accordance with the principles set out in this Article”²¹⁵

- that is, be capable of ensuring the applicants’ subsistence.

One of the material conditions, housing, is addressed in more detail. If it is provided in kind,

“it should take one or a combination of the following forms:

- (a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border;
- (b) accommodation centres which guarantee an adequate standard of living;
- (c) private houses, flats, hotels or other premises adapted for housing applicants.”

When making such provision of housing in kind, the applicants’ family life must be protected; in particular, minors should be placed with relatives.²¹⁶ Transfer to other housing should occur only “when necessary”.²¹⁷ Accommodation personnel must be adequately trained and be bound by “the confidentiality principle as defined in the national law”.²¹⁸ But exceptionally, Member States may “for a reasonable period which shall be as short as possible” set other modalities for housing that “shall cover in any case basic needs”.²¹⁹

Do these material reception conditions fall within the scope of Refugee Convention benefits? They address subject matter covered by Articles 21 and 23 RC, on housing and public relief. These Refugee Convention provisions apply only to “lawfully staying” refugees – applicants could hence claim their benefits only after three months’ presence. Further, Articles 21, 23 and 24 RC do not impose the obligation to provide refugees with housing or assistance or health care; rather, they require that lawfully staying refugees have access to those benefits on equal footing with nationals or aliens generally.

For the most part, hence, the material reception conditions fall outside the scope of these Refugee Convention benefits; conversely, the Reception Standards Directive does not, in general, address these benefits. Only applicants who are lawfully staying for over three months could claim that the

Directive be applied in accordance with the Refugee Convention. For practical purposes, they could claim that the assistance that is provided to them is on an equal footing with public welfare afforded to nationals, and access to housing under the same conditions as apply to aliens generally.²²⁰

Non-material reception conditions

[608] As to the non-material reception conditions, “documentation” and “freedom of movement” (Articles 6 and 7 RSD) were discussed above (paragraph 8.7.1 and 8.7.2.1). The Reception Standards Directive addresses some other conditions, which concern subject matter covered by the Refugee Convention. Article 10(1) RSD provides that minor (children of) asylum seekers have “access to the education system under *similar* conditions as nationals” (emphasis added); this education may moreover be offered at “accommodation centres”. In both respects, the provision suggests a lower standard than Article 22(1) RC, which requires “the *same* treatment as nationals” (emphasis added) for refugees in terms of primary education.²²¹ According to Article 10(2) RSD,

“Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor or the minor’s parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system.”

Does the first clause of this provision entail that minors can be excluded from any education for three months?²²² A reading in conjunction with Article 10(1) and the second clause of Article 10(2) RSD and in accordance with the Refugee Convention rather implies that Member States may provide for a three months’ period of “specific education” in order to facilitate access to the regular system.

[609] On employment, Article 11 states:

- “1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.
2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.”

Thus, only after one year, must some access to the labour market be granted. But according to Article 17(1) RC, after three months lawful presence, refugees are entitled to engage in wage earning employment. Article 11(1)

RSD should be implemented accordingly.²²³ Article 11(4) RSD allows the Member States to cede priority to nationals of other Member States or EEA-states. Doing so would run counter to Article 17(1) RC, requiring the “most favourable treatment accorded to nationals of a foreign country in the same circumstances” (cf. number [577]). According to Article 18 RC, any lawfully present refugee is entitled to self-employment on an equal footing with aliens generally.

The Reception Standards Directive further requires the Member States to provide for health care, including “at least emergency care and essential treatment of illness”, as well as “necessary medical or other assistance to applicants who have special needs”, such as victims of “torture, rape or other serious acts of violence”.²²⁴

As to persons with special needs, such as (unaccompanied) minors and victims of torture, their “specific situation” must be taken into account when implementing the Directive.²²⁵ The “best interests of the child shall be a primary consideration”.²²⁶ The rules on treatment of unaccompanied minor applicants are almost identical to those applying to unaccompanied minor refugee or subsidiary protection status beneficiaries.²²⁷

8.7.2.3 Reduction of benefits and procedures

[610] In order to “restrict” the “possibility of abuse of the reception system”,²²⁸ a Member State “may” reduce or withdraw “reception conditions” (apparently, both material and non-material ones) for applicants in a limited number of cases.²²⁹ They may do so *inter alia* when the applicant abandons the place of residence without permission, when the applicant does not comply with his reporting duties, in case of a subsequent application or when the application was not made as soon as possible.²³⁰ Hathaway observes that the Refugee Convention does not provide for a justification for denying Refugee Convention rights on these grounds.²³¹

The grounds for reduction or withdrawal of benefits are also grounds for a negative decision on an application for asylum,²³² which would, as far as entitlement to reception conditions is concerned, amount to the same thing. In case of a negative decision, an applicant need no longer be allowed to remain on the territory, and therefore entitlement to benefits in the Reception Standards Directive would end.²³³

The Reception Standards Directive contains a few rules on procedures concerning the grant and withdrawal of applicant status benefits. The decision

that the applicant is entitled to the material reception conditions only if he resides at some particular place must be taken “individually”;²³⁴ decisions on temporary permission to leave assigned “areas” or “places of residence” must be taken “individually, impartially and objectively”.²³⁵ The same standard applies to decisions on reduction and withdrawal of Reception Standards Directive benefits.²³⁶ This standard is the same that applies to decisions on applications for asylum (or subsidiary protection).²³⁷ As to the authorities involved in supplying the secondary rights, persons working in accommodation centres and those working with unaccompanied minors “shall be adequately trained and shall be bound by the confidentiality principle as defined in the national law in relation to any information they obtain in the course of their work”.²³⁸

Negative decisions on the grant of an applicant’s secondary rights must, at least in last instance, be open to “appeal or review before a judicial body”. Further rules on these procedures are to be laid down in national law.

As to applicants held in detention, Article 17(2) PD provides that “Member States shall ensure that there is the possibility of speedy judicial review.” The provision serves to secure accordance with Article 5(4) ECHR, which requires that

“[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

The European Court of Human Rights has elaborated on the requirements that apply to this review.²³⁹

8.7.3 Family unity

[611] Family members of applicants are entitled to Reception Standards Directive benefits on the same footing as applicants “if they are covered by such application for asylum according to the national law”.²⁴⁰ The Reception Standards Directive hence leaves it to the discretion of the Member States to establish a dependant applicant status or not.

The Directive contains no obligation for the Member States to secure that applicants are not separated from their family members.²⁴¹ But the criteria on determining responsibility concerning family unity in the Dublin Regulation do to a certain extent secure maintenance of family unity, and may even serve to bring about family reunification for applicants.

The Dublin criteria that are relevant for family unity are laid down in Articles 6 to 8, 14 and 15 DR. As we saw in chapter 7.2.1, the criteria apply in the order in which they appear in the regulation. The rules apply only if the family ties existed already in the country of origin.²⁴²

When the applicant is an unaccompanied minor, the responsibility falls upon the Member State where the father, mother or guardian is “legally present”.²⁴³ The term “legally present” (or “legal”) is not defined in the Regulation; I assume it concerns any status, including applicant status. When the applicant is an adult,²⁴⁴ the responsibility lies with the Member State where the spouse or unmarried partner, or a minor child is recognised as a refugee.²⁴⁵ If these grounds are not applicable, the Member State where the spouse, unmarried partner or minor child has lodged an application on which no first decision has yet been taken is responsible.²⁴⁶ These provisions thus function as grounds for family reunification.

If these criteria do not apply, application of Articles 9 to 13 DR (responsibility because of involvement in the alien’s entry into the European Union, see number [481]) could lead to separation of spouses, unmarried partners or their minor children who entered the European Union (practically) at the same time.²⁴⁷ Article 14 DR however ensures that in such a case, one Member State is responsible. This provision secures maintenance of family unity if family members arrive together, but several Member States would be responsible (for instance, because the applicants possess visas issued by different Member States), and it provides for family reunification if such family members arrived in different Member States.

[616] Most interesting, finally, is Article 15 of the Dublin Regulation. Any Member State is competent, regardless of responsibility pursuant to the Regulation, to reunite “family members” (spouse and minor children) as well as “other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations”. The provision is of interest in two kinds of situation. First, if relatives qualify as “family members” in the sense of the Dublin Regulation, but the above-mentioned criteria do not apply to them. This is the case if pursuant to the Dublin criteria one Member State is responsible for an applicant, whose family member has been granted subsidiary protection status by another Member State. Second, if “relatives” do not qualify as “family members” (and accordingly, the mentioned criteria do not apply). The term “relatives” is not defined in the Dublin Regulation.

The Dublin Regulation recommends application of the competence *ex* Article 15 DR in two instances. First, Member States “shall if possible”

reunite minor unaccompanied asylum seekers with relatives in another Member State, when the relatives can take care of them.²⁴⁸ Secondly, when the dependence is due to “pregnancy or a new-born child, serious illness, severe handicap or old age”, the Member States “shall normally bring together” the asylum seeker and the relative.²⁴⁹ This provision applies both when the asylum seeker is dependent upon the relative, as well as when the relative is dependent upon the applicant.²⁵⁰ But for reasons to be discussed under number [653], Article 15 DR does not provide aliens with a *claim* to maintenance of family unity or family reunification.

[617] Could applicants successfully invoke rules of international law on family unity? We saw that for application of Article 8 ECHR, “settled status” in the host state is required; there is no reason to assume “applicant status” would qualify as a “settled status”.²⁵¹

It appears however that the right to family life ex Article 17(1) (“[n]o one shall be subjected to arbitrary or unlawful interference with his [...] family [...]”) read in conjunction with Article 23 CCPR (“[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State”), as read by the Human Rights Committee, is more lenient in this respect. In *Bakhtiyari*,²⁵² the Committee addressed the imminent expulsion of spouse and children of Mr. Bakhtiyari, whose application was still being examined and who could not be expelled during that examination. The Committee observed that

“[t]aking into account the specific circumstances of the case, the Committee takes the view that removing Mrs Bakhtiyari and her children without awaiting the final determination of Mr Bakhtiyari’s proceedings would constitute arbitrary interference in the family of the authors, in violation of articles [17(1) and 23(1) CCPR]”.²⁵³

Hence, Article 17 read in conjunction with 23 CCPR does not require that “settled status” was acquired. When considering whether the decision on expulsion of the applicant’s family members would amount to “arbitrary interference” with the mentioned provisions, the Committee took into account factors that also figure in the context of decisions under Article 8 ECHR, in particular the absence of proper justification for the interference by the state.²⁵⁴ The Committee’s views offer, as far as I know, no grounds for stating that the same reasoning applies to reunification of applicants with family members.

Article 17 read in conjunction with 23 CCPR might be especially relevant especially in cases where the Dublin allocation rules do not resist separation of family members. For example, where family members could be

separated from a spouse or parent (or minor) whose application has been rejected at first instance, and this decision is subject to appeal that has suspensive effect – the type of case under scrutiny in *Bakhtiyari*. In such a case, the concerned Member State would be competent to assume responsibility on the basis of Article 3(2) or 15 DR. Arguably, it would have to make use of this competence in order to comply with Article 17 read in conjunction with 23 CCPR

8.7.4 Concluding remarks

[618] According to the Preamble to the Reception Standards Directive, its provisions should, first, “normally suffice to ensure [applicants] a dignified standard of living”, and second, ensure that they enjoy “comparable living conditions in all Member States.”²⁵⁵ The “dignified standard of living” addresses the “right to human dignity” laid down in Article 1 of the Charter, for which provision the Directive seeks to ensure “full respect”.²⁵⁶ Handoll however doubts whether the standards laid down in the Reception Standards Directive will indeed “normally suffice” to secure this dignity.²⁵⁷

“Comparable living conditions”, that is the “harmonisation of conditions for the reception of asylum seekers” are desirable in order to “limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception”.²⁵⁸ But in several respects, the Directive hardly provides “common minimum conditions”.²⁵⁹ Thus, the personal scope of application of the Directive may diverge considerably among Member States: in some Member States, applicants for subsidiary protection are not entitled to the Directive’s benefits, and each Member State may decide for itself whether the instrument applies to family members of the applicant (cf. numbers [263] and [611]). Further, certain conditions for enjoying a number of secondary rights, such as access to the labour market, are left to the Member States.²⁶⁰ The choice left to the Member States between providing material reception conditions in kind, or in the form of financial allowances or of vouchers (number [607]) allows for more disharmony.

[619] Are the CEAS rules on secondary rights for applicants in accordance with relevant international law? As to the Refugee Convention, we saw that Article 63 TEC and secondary Community asylum law reflect in several instances the declaratory understanding of refugee status determination (par. 8.7.1). Applicants who are formally allowed to stay during asylum procedures are

entitled to the Refugee Convention benefits for lawfully present (and after three months, lawfully staying) refugees.

The Reception Standards Directive however does not, in general terms, confirm this view. The Directive's provisions on treatment of applicants address the subject matter of a number of Refugee Convention benefits, but the rules on secondary rights of applicant status beneficiaries do not fully secure treatment up to the standards set by international asylum law. A number of Refugee Convention benefits are not addressed. The rules on the freedom of movement of applicants in the Procedures and Reception Standards Directive require that applicants are detained only if necessary, and not for the sole reason that they are applicants. In this, they secure accordance with Articles 31 RC and 5 ECHR. The rules on "confinement" and detention do not make provision for the entitlement of "lawfully present" refugees to freedom of movement pursuant to Article 26 RC (cf. par. 8.7.2.1). The standards on access to education are, read in context, arguably up to the standards set by Article 22 RC (cf. number [618]). Article 11 RSD, finally, allows for restrictions on the access to the labour market that are at odds with the Refugee Convention (number [609]).

Hence, the standards of treatment prescribed by Reception Standards Directive provisions deviates in certain respects quite substantially from their counterparts in the Refugee Convention. The Refugee Convention may have served as a source of inspiration for the range of secondary rights of applicants, but it did not leave a strong imprint on the content of those entitlements.

The Dublin Regulation criteria for allocation serve as a means of securing the family unity of applicants, but not for each and every case. Arguably, applicants cannot successfully invoke protection of family unity under Article 8 ECHR. On the other hand, expulsion of an alien, whose application was turned down which resulted in the separation of his family members whose applications were still being examined might be arbitrary interference with his family life, prohibited by Articles 17 and 23 CCPR.

8.8 Temporary protection

8.8.1 Temporary protection and Convention refugee status

[620] We saw above that in order to comply with their obligations under the Refugee Convention, Member States must treat applicants as (unrecognised) refugees (number [601]). On the same grounds, aliens to whom temporary

protection status is granted upon an application for asylum (for refugee status) should be treated as unrecognised refugees.²⁶¹ Therefore, from the moment refugees apply for asylum or temporary protection, all benefits that address unrecognised refugees *tout court* apply. Temporary protection beneficiaries must be provided with “residence permits for the entire duration of the protection”, that is, (at least) one year,²⁶² which confirm the lawfulness of their presence. Upon issue of this permit, the beneficiary is “lawfully staying” for the purposes of the Refugee Convention.

Thus, the Refugee Convention entitles temporary protection beneficiaries to all benefits applying to unrecognised lawfully staying refugees. European asylum law however is decidedly ambiguous on this entitlement. As discussed in Chapter 3.3.4, pursuant to Article 63(2)(a) TEC temporary protection applies to “displaced persons and refugees”. Thus, the provision explicitly states that temporary protection beneficiaries do fall within the scope of the Refugee Convention. But unlike Article 63(1) TEC, it does not explicitly require that standards on these refugees be “in accordance with” the Refugee Convention.

The temporary Protection Directive expresses the declaratory reading of refugee status where it states that temporary protection applies to persons who “may fall within the scope of Article 1A” RC,²⁶³ that is to unrecognised refugees. Likewise, by defining “refugees” as “third country nationals or stateless persons within the meaning of Article 1A of the Geneva Convention”²⁶⁴ the Temporary Protection Directive embraces the declaratory reading of the term “refugee”. But then it defines “displaced persons” as third country nationals who (*inter alia*) “may fall within the scope of Article 1A of the Geneva Convention”.²⁶⁵ So apparently, we must distinguish between persons who *may* fall within, and those who *are* within the scope of Article 1A RC – which reflects the distinction between the constitutivist and the declaratory understanding of the recognition of refugee status (cf. number [554]). The Preamble further states that “temporary protection should be compatible with the Member States’ obligations as regards refugees”.²⁶⁶ Does it mean to say that temporary protection beneficiaries are entitled to relevant Convention benefits? Maybe to a very limited extent only, for it continues:

“[i]n particular, [temporary protection] must not prejudice the recognition of refugee status pursuant to the [Refugee Convention]”.²⁶⁷

Even more in particular, Article 3(2) TPD states that

“Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding *non-refoulement*”.

So, the Directive does not explicitly require that temporary protection is applied with “due respect” for the Refugee Convention. In other words, it does not state *expressis verbis* that temporary protection status entails entitlement to relevant Refugee Convention benefits.

As observed, the conformity of temporary protection with the Refugee Convention as regards applicants is not affected by the absence of such acknowledgement. Rather, the level of protection secured by the Temporary Protection Directive matters.

8.8.2 Temporary protection status benefits

[621] Temporary protection status is of limited duration: the status applies for one year, unless the Council decides to end it earlier, and may be extended to two or, exceptionally, three years.²⁶⁸ Its beneficiaries must be provided with “residence permits for the entire duration” of the temporary protection.²⁶⁹ Treatment of the beneficiaries must “not be less favourable” than the treatment set out in the Temporary Protection Directive.²⁷⁰ Temporary protection beneficiaries are excluded from the scope of the Residence Standards Directive.²⁷¹

Most Temporary Protection Directive provisions on secondary rights address subject matter covered by the Refugee Convention. Protection from *refoulement* is not stipulated, but implied by the requirement to “apply temporary protection with due respect for [...] obligations regarding non-*refoulement*” in general,²⁷² and to issue “residence permits for the entire duration of temporary protection” in particular.²⁷³ Minor temporary protection beneficiaries are to have “access to the education system under the same conditions as nationals” - a standard almost identical to the one applying to refugee status beneficiaries and up to the standard set by Article 22(1) RC.²⁷⁴ Further, Member States “may allow” adults access to the education system;²⁷⁵ treatment on the same conditions as apply to aliens generally, stipulated by Article 22(2) RC, is hence not required.

Member States must authorise temporary protection beneficiaries to engage in employed and self-employed activities, “subject to rules applicable to the profession”.²⁷⁶ The right of lawfully staying refugees to (self-)employment (Articles 17-18 RC) is hence recognised in much the same terms as is applicable to refugee status beneficiaries.²⁷⁷ But priority over temporary protection beneficiaries may be given to EU or EEA nationals or legally resident third country nationals as to access to the labour market, which does not apply

to refugee status beneficiaries.²⁷⁸ Ceding priority to such non-nationals would not constitute “most favoured treatment accorded to nationals of a foreign country”, required by Article 17 RC.

As to housing, “access to suitable accommodation or, if necessary, the means to obtain housing” must be secured.²⁷⁹ This obligation arguably exceeds the one set by Article 21 RC (that, with regard to housing, merely requires treatment as aliens generally). Welfare and medical care must be provided at a level defined as “necessary”,²⁸⁰ not, as Articles 23 RC does, as for “nationals”.

The Temporary Protection Directive, finally, contains a number of provisions not explicitly covered by the Refugee Convention: the right to the issue of a permit, and to information on the status.²⁸¹ Persons with special needs must be provided “necessary medical or other assistance”.²⁸² The Directive contains an arrangement on guardianship over, and housing for, unaccompanied minor temporary protection beneficiaries quite like those applying to unaccompanied minor refugee and applicant status beneficiaries.²⁸³

8.8.3 Family unity

[622] Temporary protection beneficiaries cannot rely on the Family Reunification Directive,²⁸⁴ but the Temporary Protection Directive itself sets rules for reunification of relatives of temporary protection beneficiaries, both out- and inside the European Union.²⁸⁵ Member States must allow for reunification with unmarried minor children and with spouses or unmarried partners “in a stable relationship”, where the aliens legislation or practice of the concerned Member State treats unmarried partners comparably to married couples.²⁸⁶ Further, reunification “may” take place with “other close relatives”, if they were dependent upon the temporary protection beneficiary when the events leading to the mass influx arose. Member States then must take into account “the extreme hardship which” those other close relatives “would face if the reunification did not take place.”²⁸⁷

The Directive sets three more conditions on claims for family reunification. In order to qualify as a “family member” it is required that, first, the family ties existed already in the country of origin, and, second, that these ties were disrupted due to circumstances surrounding the mass influx.²⁸⁸ Third, the relatives must either be temporary beneficiaries themselves (if already present in the European Union) or they must be “in need of protection” (if still outside the EU).²⁸⁹

[623] Could temporary protection beneficiaries rely on Article 8 ECHR for the purpose of family reunification? In *Gül*, the European Court of Human Rights suggested that the temporary rather than permanent right of abode in the host country was a relevant, though not decisive factor for considering that refusal of family reunion was not in breach of Article 8 ECHR.²⁹⁰ In case of temporary protection beneficiaries, the violence in the country of origin provides for major obstacles to leading a normal family life there. Bearing in mind that temporary protection may last up to three years, and that during this period the alien might qualify for a more durable right to remain, we may assume that temporary protection beneficiaries could successfully invoke the right to family life.

Assuming so, we should address the question of how far the Temporary Protection Directive secures the right to family reunification ex Article 8 ECHR of temporary protection beneficiaries. The limitation of the obligation to reunite family members to members of the core family is not at variance with Article 8 ECHR, as we saw above. But the requirement that the circumstances surrounding the mass influx caused the separation of family members, and moreover that the relative is in need of protection may, under certain circumstances, be unduly strict. In family reunification cases, a most relevant issue is whether or not “major obstacles” stand in the way of leading a normal family life in the country of origin, and the alien’s need for (temporary) protection entails that his country of origin does not pose an alternative place for leading family life (see number [573]). This, however, is not different in the case that the family member is not in need of protection, as Article 15(1) TPD requires. Further, the fact that an applicant for reunification voluntarily left his family members is a material (yet not decisive) factor. But also if the separation of the temporary protection beneficiary was not due to violence in the country of origin (or other circumstances surrounding the mass influx), the separation may not have been voluntary – which Article 15(1) TPD fails to appreciate.

On the other hand, we may observe that once the conditions for reunification (addressed under the previous number) are met, reunification is obligatory. These conditions do not address or leave room for interests of the Member States, such as control of immigration. The arrangement therefore leaves the Member States no margin for balancing the interests of the temporary protection beneficiary with their own – which Article 8 ECHR does allow for (cf. number [573]). Article 15 TPD therefore secures to a considerable extent the right to family reunification. Indeed, its standards may exceed the Member States’ obligations under Article 8 ECHR.

8.8.4 Concluding remarks

[624] European asylum law is ambiguous on the refugee status of temporary protection beneficiaries. Whereas Article 63(2) TEC explicitly acknowledges that these persons may be “refugees”, the Temporary Protection Directive does not confirm that its beneficiaries are entitled to all Refugee Convention benefits applying to unrecognised refugees.

As to the individual benefits, only the right to education for minors is couched in terms comparable to those employed in the Refugee Convention: access under the same conditions “as nationals” is stipulated. Other provisions do not define the benefit by reference to “nationals” or some other group as the Refugee Convention does. Still, by requiring that temporary protection beneficiaries have access to the labour market, the Directive treats them as lawfully staying refugees. Although the Temporary Protection Directive does not secure that temporary protection beneficiaries enjoy all relevant Refugee Convention benefits, the content of temporary protection seems to be modelled to a considerable extent on the Refugee Convention. The arrangement on family reunification exceeds in certain respects (but not for all situations) the requirements of Article 8 ECHR.

8.9 Assessment

[625] The instrument of international asylum law that is most relevant for secondary rights of persons in need of protection is the Refugee Convention. Some of its benefits apply only to recognised refugees, most of them, however, apply to unrecognised refugees as well (see paragraph 8.2.5). Persons who fulfil the requirements of Article 1 RC and who applied for refugee status but received applicant or temporary protection status, are “applicants” or “temporary protection status beneficiaries” in the terms of European asylum law. But for the purposes of the Refugee Convention, they are (unrecognised) “refugees”; depending on the circumstances, they may further qualify as “lawfully present”, “residing” or “lawfully staying” refugees. In order to comply with their obligations under the refugee convention as regards such unrecognised refugees, the Member States should treat applicants and temporary protection beneficiaries in accordance with the relevant convention provisions.

European asylum law is decidedly ambiguous about this matter. Arguably, Article 63(1) TEC suggests that the Refugee Convention is relevant for reception standards of applicants; and Article 63(2) TEC expresses the view that

temporary protection beneficiaries may be (unrecognised) refugees (numbers [602] and [620]). The Preambles to the Qualification Directive and the Temporary Protection Directive confirm this declaratory understanding of the term refugee in several instances. The European asylum legislation consistently requires that unrecognised refugees are protected from *refoulement*, in accordance with Article 33 RC. But in other respects the legislation explicitly allows for treatment of temporary protection beneficiaries, and far more so of applicants, that fall short of the standards set by the Refugee Convention. In which respects European asylum law on secondary rights secures conformity with the Refugee Convention and other relevant international law, and in which respects it does not, was addressed above (numbers [576]-[577], [606]-[609] and [621]).

[626] In Chapter 5.8, it was observed that under secondary European asylum law refugee status enjoys a primary position over subsidiary protection and applicant status, that applicant and subsidiary protection status may concur, and that temporary protection status may concur with the other three statuses. In terms of secondary rights, the refugee status occupies a prime position over all other statuses. The less durable nature of applicant and temporary protection statuses may serve as an explanation for the lower standard for secondary rights as compared to refugee status. The secondary rights of subsidiary protection beneficiaries are to a certain extent similar to those of refugees, but in a number of important respects they are less favourable (such as the duration of the residence permits, the rules on family reunification and benefits of family members, cf. numbers [596], [597] and [598]). These lower standards are not contrary to international law, as no instrument sets conditions on the secondary rights of persons who do not qualify for refugee status. But are these differences also justified from the point of view of the Common European Asylum System? Assuming that European asylum law establishes a status for refugees that is “appropriate” to serve their needs, we should consider why the lesser secondary rights for subsidiary protection beneficiaries provide them with an “appropriate” status as well.²⁹¹ Subsidiary protection differs from refugee protection mainly in two respects: Convention grounds for the risk of harm are absent, and it may apply in case of indiscriminate violence as defined in Article 15(c) QD (see number [597]). Absence of Convention grounds for risk of harm cannot justify lesser secondary rights. Arguably, the lower standards for subsidiary protection beneficiaries are justified only by the (allegedly) less durable nature of the risk in case of indiscriminate violence. The principle that the beneficiary’s claims to the host state grow

stronger if his ties with it are tighter also lies at the basis of the “system” of allocation of Refugee Convention benefits (see number [543]). If this contention is true, it once more underlines the importance of Article 15(c) QD for the scope of subsidiary protection, and reinforces the finding that its personal scope differs from the scope of the other sub-paragraphs of Article 15 QD.

[627] When overseeing the rules on family reunification in European asylum law, the absence of rules for subsidiary protection beneficiaries catches the eye. These status holders cannot invoke the Family Reunification Directive, nor is reunification of family members requesting asylum in the European Union with subsidiary status holders required (though Member States may request transfer of such family members under Article 15 DR, cf. number [616]). It was observed that refusal of family reunification of subsidiary protection beneficiaries may be in breach of Article 8 ECHR (number [598]). Here, we should address the question of whether the difference in treatment is justified from the point of view of the Common European Asylum System.

Arguably, the only feasible justification for the difference in treatment of refugees and subsidiary protection beneficiaries is that refugees are considered to “have reasonable prospects of obtaining the right of permanent residence”,²⁹² and subsidiary protection beneficiaries are not. European asylum law rules on issue and renewal of residence permits for both categories do not draw such a distinction (Article 24 QD, cf. number [576] above), but we saw above that this view also explains other differences as regards the scope of secondary rights. However, it fails to explain why European asylum does secure the rights to family reunification of temporary protection beneficiaries, who by definition have less prospects to durable residence than subsidiary protection beneficiaries.

[628] The family reunification rules for temporary protection are remarkable for yet another reason: they are in one respect more favourable than the rules that apply to refugees. In the case that a refugee submits the application for family reunification more than three months after refugee status was granted, the Member State may state the condition that he disposes of “normal” accommodation, sickness insurance and a stable income (other than social assistance; see number [584]). This condition cannot be applied to requests by temporary protection beneficiaries.²⁹³

This difference can obviously not be explained by the grounds for offering protection – a temporary protection beneficiary is a person who “may” be a refugee (see number [620]). Could the particular requirements on reunifica-

tion for temporary protection beneficiaries explain this difference? Article 15 TPD requires that the family member is “in need of protection”, but the same holds true “normally” for the refugee’s family members, so the Qualification Directive states.²⁹⁴ The provision further requires that the family ties were disrupted because of the circumstances surrounding the mass influx (see number [622]). A similar consideration will often if not normally hold true for the refugee, who had to leave his family in order to escape persecution. Possibly, the “three months rule” in the Family Reunification Directive is the expression of the supposition that if indeed persecution was the cause for the separation of the refugee from his family, he would have requested reunification within three months. Thus read, European asylum law accords the refugee the same favourable treatment as the temporary protection beneficiary, but only during the three months after the grant of refugee status. But then the question remains why the “three months rule” does not apply to temporary protection beneficiaries.

[629] The CEAS is consistent where it limits obligatory reunification with only core family members (parents and minor children), but not in its elaboration of this obligation. The definition of unmarried partner in the Family Reunification Directive is different from those in the Temporary Protection Directive and in the Dublin Regulation (cf. numbers [583], [622] and [615]). Moreover, where the Family Reunification Directive leaves the Member States complete discretion as to grant the right to reunification with unmarried partners, the latter two instruments require reunification if domestic aliens law or practice in general treats unmarried partners comparably to married couples. Even the definitions of minor children diverge. The Family Reunification Directive and the Temporary Protection Directive require reunification of the refugee or temporary protection beneficiary with both his or her own minor children as well as those of the spouse, whereas the Dublin Regulation arrangement is restricted to children of the “couples” of the asylum seeker and the spouse or unmarried partner.²⁹⁵ For reunification with relatives other than core family members, all three arrangements require some sort of humanitarian need, but the definition of this need varies widely. Article 15(1) DR speaks of mere dependence, elaborating upon this dependence in Article 15(2) DR. For reunification of adult refugees with their parents, next to dependence absence of “proper family support” is required (number [583]) – apparently, one can enjoy proper support from one relative and still depend on another one. Reunification of temporary protection beneficiaries with relatives is indicated only when the latter “would face extreme hardship” if it did not take

place (number [622]); dependence is therefore not required. Finally, the detailed arrangement for proof of family ties for the application of the Dublin criteria is striking (cf. number [492]), whereas the Family Reunification Directive only gives quite loose rules (number [585]). Possibly, the Dublin rules will have harmonising effect on the latter in practice.

[630] Could the “right to asylum” ex Article 18 Charter be of any relevance for the CEAS protection statuses? This right entails a claim to durable protection and appropriate secondary rights, which the Member States should “guarantee”, with “due respect for the [Refugee Convention]” (cf. paragraph 2.3.5). Arguably, when the refugee is within the European Union and the exception of the safe third country is not applied (cf. number [540]), there is no other way of complying with the obligation to “guarantee the right to asylum” but by granting “an appropriate status”.²⁹⁶ Article 63 TEC as well as the legislation implies that the Member States may grant to Convention refugees next to refugee status, applicant status or temporary protection status. If we accept that the latter two statuses are statuses as meant by “asylum” in Article 18, the only added value of Article 18 would be a claim to be recognised as an asylum seeker, for the obligation to “guarantee” this status “with due respect for” the Refugee Convention is also implied by Articles 63(1) TEC.

Arguably, however, the right to asylum may have further implications. If the right to asylum implies a claim to a durable solution, the temporary nature of temporary protection and asylum seeker statuses are exceptions to this right. These statuses may be regarded as “appropriate” because of the circumstances involved – the need to properly examine the claim for asylum, or the impossibility of doing so due to the great number of applications in the case of a mass influx. But if examination takes too long, or the circumstances may not otherwise justify postponement of the offer of a durable solution, asylum seeker or temporary protection status is at variance with the obligation to guarantee the right to the appropriate, more durable refugee or subsidiary protection status. As a matter of practice, it may be argued that the right to asylum implies a temporal limit to asylum seeker or subsidiary protection status for Convention refugees. As argued in paragraph 8.2.4, the Refugee Convention requires that refugee status should be determined ultimately three years after the application. Accordingly, temporary protection is limited to three years. Arguably, the same limit applies to examination of the application for asylum, although no instrument of European asylum law states this.

NOTES

- ¹ Article 63(3)(a) TEC.
- ² Cf. Article 1 QD.
- ³ Articles 63(1)(b) TEC and 1 RSD.
- ⁴ Cf. Article 8(2) TPD.
- ⁵ This is not to say that the latter two categories are not entitled to Refugee Convention benefits; see below number [601] and [620].
- ⁶ Hathaway 2003, p. 2.
- ⁷ The objective of striking this balance also finds expression in the preamble to the instrument – see number [558].
- ⁸ Most provisions applying to refugees *tout court* imply the requirement of presence; cf. Grahl-Madsen 1972, p. 359, and cf. number [566] below.
- ⁹ According to Merriam-Webster's dictionary, "lawful" means "being in harmony with the law"; the French equivalent "régulier", according to Larousse, "conformément à la règle, à la loi".
- ¹⁰ Article 31 RC: "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those, which are necessary, and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country".
- ¹¹ The French "régularisé" connects the act of regularisation tightly to the term "régulier", the equivalent of "lawful" in the English language version. We can safely conclude that regularisation thus means, "making lawful". Unwillingness to coin an awkward term may serve to explain why the English text applies "regularisation", which, in its ordinary sense, is indeed very close to "making lawful" (cf. Merriam-Webster's: "regularisation - to make regular by conformance to law, rules, or custom"). Cf. Grahl-Madsen 1972, pp. 344 and 359f.
- ¹² Grahl-Madsen 1972, pp. 372 and 344-389; Goodwin-Gill 1996, pp. 307-308; Steenbergen et al. 1999, pp. 152-153.
- ¹³ Hathaway 2003, p. 11.
- ¹⁴ Hathaway 2003, p. 11n; it concerns UN Doc. E/AC.32/SR.15, p. 20.
- ¹⁵ Cf. number [26].
- ¹⁶ Vermeulen 1997, p. 30f.
- ¹⁷ Merriam-Webster's Dictionary, under 1a and 1b.
- ¹⁸ Article 6 RC: "For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of

sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling”; cf. Grahl-Madsen 1963, Comment on Article 6 under (3).

¹⁹ Par. 14 of the Schedule: “Subject only to the terms of par. 13, the provisions of this Schedule in no way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories of the Contracting States”.

²⁰ Grahl-Madsen 1972, pp. 353-4. Cf. also Hathaway 2003, p. 5; Steenbergen et al. 1999, p.158.

²¹ Cf. Article 62(2)(b) TEC.

²² The term “lawful residence” also occurs in the English language version of the Schedule attached to the Convention to which Article 28(1) refers, without any indication to a difference in meaning – cf. Schedule pars. 6(1), 6(3) and 11.

²³ Hathaway 2003, p. 5.

²⁴ Grahl-Madsen 1972, p. 354.

²⁵ Steenbergen 1999, pp. 152-153 and Hathaway 2003, p. 3.

²⁶ Article 14 RC states that “a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence”; Article 16 RC states: “2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*. 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.”

²⁷ Oxford English Dictionary.

²⁸ Grand Larousse: “Lieu ou une personne habite ou est censée habiter en permanence ou de façon habituelle (...) spéc. *Domicile légal*, ou simplem. *domicile*, lieu unique où la loi présume qu’une personne se trouve pour l’exercice de ses droits et l’accomplissement de ses droits”.

²⁹ Cf. Articles 13 and 2 (d) QD and 2(c) read in conjunction with (b) PD.

³⁰ E.g. Grahl-Madsen 1967, par. 340-341, Spijkerboer & Vermeulen 1995, p. 214; Hathaway 2003, pp. 3-4.

³¹ UNHCR Handbook, par. 28.

³² That is, before the entry into force of the Refugee Convention (cf. Goodwin-Gill 1996, p. 6).

³³ One may feel that Article 31 RC, where it addresses “regularization” of refugees, also has bearings on recognition. But as argued under number [546], it follows from the context that

“regularization” rather addresses the qualification “lawful”; and the terms “lawful” and “recognised” are not synonymous (see number [561] below).

³⁴ Article 7(1) and (3) RC also speak of “according” treatment and (Refugee Convention) rights and benefits to refugees.

³⁵ Cf. Noll 2000 pp. 423-431 for a thorough discussion.

³⁶ Goodwin-Gill 1996, p. 308.

³⁷ Cf. Grahl-Madsen 1972, p. 367.

³⁸ Goodwin-Gill 1996, p. 308.

³⁹ It follows from the drafting history that the term “lawfully in their territory” was deliberately chosen; it replaces the term “authorized to reside regularly”, equivalent to lawfully staying in the original proposal (cf. Grahl-Madsen 1963, Comment to Article 32 under (1)).

⁴⁰ For instance, refugees who did not comply with some requirement under domestic law, such as timely renewal of the residence permit (cf. Grahl-Madsen 1972, p. 367).

⁴¹ Grahl-Madsen 1963, Commentary on Article 28; Steenbergen et al. 1999, p. 158.

⁴² Cf. Preamble RC, fifth recital.

⁴³ Vermeulen 1997a, pp. 29-34, Lauterpacht & Bethlehem 2003, p. 116.

⁴⁴ Article 30(2) RC: “*A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted*”; cf. Grahl-Madsen 1963, Commentary to Article 30, under (3).

⁴⁵ Article 27 RC: “*The Contracting states shall issue identity papers to any refugee in their territory [...]*”.

⁴⁶ Chen 1951, pp. 13-78; Crawford 1979, pp. 10-24; Brownlie 1998, pp. 85-90.

⁴⁷ See Zwaan 2003, p. 14-17; Spijkerboer & Vermeulen 1995, pp. 275-276; Hailbronner 1992, p. 925.

⁴⁸ Vermeulen observes that Article 31(2) RC implies an obligation to “regularise” the refugee’s status in case the unlawfully present refugee cannot obtain admission to another country, and suggests that this regularisation implies determination of refugee status (Vermeulen 1997, p. 30). But arguably, regularisation means “making lawful”, which will often but does not necessarily imply determination of refugee status – the Contracting state could also issue (for example) temporary protection status (see Zwaan 2003, p. 28; Grahl-Madsen 1972, pp. 364-5; and cf. number [562] above).

⁴⁹ Meijers 1990, p. 433.

⁵⁰ See Grahl-Madsen 1972, pp. 441-443 who states the same on somewhat different premises.

⁵¹ Recommendation B to the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: “*The Conference [...] B. [...] RECOMMENDS Governments to take the necessary measures for the protection of the refugee’s family especially with a view to: (1) Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admis-*

sion to a particular country. (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.”

⁵² Cf. ECtHR 18 February 1991, Ser. A vol. 193 (*Moustaquim*), par. 36.

⁵³ Cf. ECtHR 28 May 1985, Ser. A vol. 94 (*Abdulaziz, Cabales and Balkandali*), par. 68.

⁵⁴ Cf. ECtHR 19 February 1996, *Rep.* 1996-I (*Gül*), par. 41.

⁵⁵ ECtHR 28 May 1985, Ser. A vol. 94 (*Abdulaziz, Cabales and Balkandali*), pars. 62-63.

⁵⁶ ECtHR 22 April 1997, *Rep.* 1997-II (*XY and Z v. UK*), par. 36.

⁵⁷ ECtHR 21 June 1988, Ser. A vol. 138 (*Berrehab*), par. 21.

⁵⁸ ECtHR 9 October 2003, Appl. No. 48321/99 (*Slivenko*), pars. 94 and 97.

⁵⁹ ECtHR 3 July 2001, Appl. No. 47390/99 (decision) (*Javeed v. The Netherlands*), under “The Law”; ECtHR 13 February 2001, Appl. No. 47160/99 (*Ezzoudhi v. France*), par. 34 (“*l’existence d’éléments supplémentaires de dépendance*”). Cf. Van Asperen & Van Duijvendijk-Brand 2002, pp. 68-70.

⁶⁰ ECtHR 28 May 1985, Ser. A vol. 94 (*Abdulaziz, Cabales and Balkandali*), par. 67; *Gül*, par. 38.

⁶¹ ECtHR 28 May 1985, Ser. A vol. 94 (*Abdulaziz, Cabales and Balkandali*), par. 67; *Gül*, par. 38.

⁶² ECtHR 21 December 2001, Appl. No. 31465/96 (*Sen*), par. 32.

⁶³ *Gül*, par. 38.

⁶⁴ In most cases on first admission, the Court investigated compliance with the positive obligation (*Abdulaziz, Ahmut* (ECtHR 28 November 1996, *Rep.* 1996-VI), *Sen*), but in *Gül*, the Court qualified the refusal to admit as an “interference” (par. 34), so apparently the negative obligation was involved. Cf. Steenbergen 1999, pp. 7-75.

⁶⁵ Boeles 2003, p. 641.

⁶⁶ *Gül*, par. 38.

⁶⁷ *Gül*, Dissenting Opinion of Judge Martens, approved by Judge Russo, under 9.

⁶⁸ I.e. *Sen*. And possibly the finding of a breach in *Sen* is due to the very particular circumstances of the case – cf. ACVZ 2004, pp. 26-7.

⁶⁹ Van Walsum 2003b, p. 125.

⁷⁰ *Berrehab*, par. 26.

⁷¹ Van Walsum 2003a, pp. 519-20.

⁷² In *Sen* par. 40 the Court spoke of “*un obstacle majeur*”, in *Boultif*, par. 48 of (mere?) “*difficulties the spouse [of the alien who is to be expelled] is likely to encounter in the country of origin*”.

⁷³ *Sen*, par. 41 (“*By leaving the applicants no choice but the one between abandoning the situation they had established in the Netherlands, and renouncing the company of their eldest daughter, the defendant State failed to strike a fair balance between the interests of the applicants on the one hand and its own interest in controlling immigration on the other*” – my translation, HB).

⁷⁴ This case concerned a Turk who had obtained a residence permit on humanitarian grounds from Switzerland. The Swiss authorities refused permission for his son Ersin to join him.

The Court stated that it had to determine “to what extent it is true that Ersin’s move to Switzerland would be the only way for Mr Gül to develop family with his son” (par. 39), and considered in this context that Gül “was unable to prove to the Swiss authorities – who refused to grant him political refugee status – that he personally had been a victim of persecution in his home country. In any event, whatever the applicant’s initial reasons for applying for political asylum, the visits he has made to his son in recent years show that they are no longer valid” (par. 41). Hence, refugee status would have been relevant for determining whether Gül could enjoy family life in Turkey.

⁷⁵ Cf. *Gül*, par. 41 (“By leaving Turkey [...] Mr. Gül caused the separation from his son”; *I.M. v The Netherlands* (“[The applicant] decided voluntarily to leave [the child] who was 20 months old at the time and completely dependant on others”); cf. Van Walsum in her annotation in this decision (van Walsum 2003, p. 131).

⁷⁶ Article 2(d) QD: “‘refugee status’ means the recognition by a Member State of a third country national or a stateless person as a refugee”.

⁷⁷ Article 24(1) QD.

⁷⁸ Cf. number [569].

⁷⁹ Cf. the Preamble QD, “Having regard to the Treaty establishing the European Community, and in particular point [...] 3(a) of Article 63 thereof”, and see number [201] above.

⁸⁰ Namely Article 21 QD, on protection from *refoulement*, explicitly addresses “unrecognised” next to “recognised” refugees (see number [393]). – We may observe that Article 33(1) QD, on “access to integration facilities” addresses “refugees” (not refugee “status beneficiaries” or the like). Bearing in mind that Member States may deny access to subsidiary protection status beneficiaries pursuant to Article 33(2) QD (see below under [597]), and even to refugee status beneficiaries prior to the issue of a residence permit (Preamble recital (30) QD, cited below in footnote 82), it is very unlikely that applicants for asylum or temporary protection beneficiaries are included in the personal scope. Arguably, we should read the term “refugees” in Article 33(1) QD as referring to “refugee status beneficiaries”.

⁸¹ Article 22 QD applies to “persons being recognised as being in need of international protection”, Articles 27 and 30 QD to minors whom refugee status has been granted.

⁸² According to Preamble recital (30) QD however, “Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.”

⁸³ Article 32 QD addresses “Freedom of movement within the Member State”; Articles 31 and 32 QD define the benefits by reference to third country nationals “legally resident in their territories”.

⁸⁴ Preamble recital (6) QD.

⁸⁵ Preamble recital (7) QD.

⁸⁶ Article 24(1) QD.

- ⁸⁷ Article 21 QD: “2. *Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refuse a refugee, whether formally recognised or not, when: (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.* 3. *Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies*”. Article 21(2)(a) QD deviates from the text of Article 33(2) RC (and Article 14(4)(a) QD, cf. number [342]) where it speaks of “considering” instead of “regarding” the refugee as a danger. There is no reason to suppose a difference in scope was intended. It may be observed that in the Dutch language version of the Directive, the wording of Articles 21(2)(a) and (b) and 14(4)(a) and (b) QD differs so much that their common origin from Article 33(2) RC is obscured. - The implications of Article 21 QD for unrecognised refugees, hence for Convention refugees whom the member status did not grant refugee status as meant in Article 13 QD, is discussed under numbers [593] and [595] (and cf. number [393]).
- ⁸⁸ Article 24 QD is stricter than Article 32(1) RC, as it requires “*compelling grounds*” for exemption from the right to remain. The phrase “*where compelling reasons of national security otherwise require*” figures in Article 32(2) RC, addressing however not the exception to the right to remain, but the exception to challenge the decision to expel.
- ⁸⁹ Article 25 QD, cf. Article 28 RC.
- ⁹⁰ Article 26 QD, cf. Articles 17, 18, 19 and 24 RC.
- ⁹¹ Article 27 QD, cf. Article 22 RC.
- ⁹² Article 28 QD, cf. Article 23 RC.
- ⁹³ Article 29 QD, cf. Article 24(1)(b) RC. Pursuant to Preamble recital (35) QD, “*health care*” encompasses both physical and mental care.
- ⁹⁴ Article 31 QD, cf. Article 21 RC.
- ⁹⁵ Article 32 QD, cf. Article 26 RC.
- ⁹⁶ Cf. Articles 27(2), 31 and 32 QD and 22(2), 21 and 26 RC.
- ⁹⁷ Grahl-Madsen 1963, Commentary on Article 7 under (2).
- ⁹⁸ Cf. Article 6 RC: “*For the purposes of this Convention, the term “in the same circumstances” implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling*”.
- ⁹⁹ Articles 3, 4, 12-16, 25 and 29 RC.
- ¹⁰⁰ Articles 22, 33 and 34 QD.
- ¹⁰¹ Article 20(3) QD.
- ¹⁰² The provision implements Recommendation B under (2) of the Final Act to the Refugee Convention, quoted above in footnote 50.

- ¹⁰³ Cf. number [254].
- ¹⁰⁴ Preamble recitals (10) and (27) QD.
- ¹⁰⁵ Article 23(2) QD, and see the following number.
- ¹⁰⁶ Article 23(2) QD.
- ¹⁰⁷ The only benefits not mentioned are “protection from *refoulement*” and the right to information on the status (Articles 21 and 22 QD).
- ¹⁰⁸ Minor children qualify as family member “regardless of whether they were born in or out of wedlock or adopted as defined under the national law” (Article 2(h), second indent QD).
- ¹⁰⁹ Article 2(h), second indent QD.
- ¹¹⁰ Article 2(h) first clause QD.
- ¹¹¹ Article 2(h) first clause QD.
- ¹¹² Article 14 DR ensures that (certain conditions fulfilled, see number [611]), one single Member State is responsible for examining asylum requests of the members of one family. Application of the provision results in reunification of family members who arrived later or in other Member States. Such family members would be “present in relation to the application” of the Directive refugee as meant in Article 2(h) QD.
- ¹¹³ Article 23(3) QD states that “*Paragraphs 1 and 2 are not applicable where he is or would be excluded [...]*.” As far as the family has no claim, this exclusion ground is obligatory, but the provision does not preclude Member States from granting this family member a dependant status on the basis of domestic law – unlike Article 12 QD in Chapter III, that excludes persons to whom 1F RC applies from “being a refugee” (cf. number [337]).
- ¹¹⁴ The other grounds for exclusion mentioned in Chapter III, cessation and exclusion because Articles 1C, 1D or 1E RC applies, have no relevance for the family member.
- ¹¹⁵ Article 23(4) QD; cf. Article 14(4) QD.
- ¹¹⁶ The Qualification Directive does not refer to the exceptions from the prohibition of *refoulement* in Article 33(2) RC, which do serve as grounds for exclusion from refugee status and from the refugee’s right to remain and to a residence permit (see number [576] above). But arguably, the “reasons” mentioned in Article 32(1) RC fully encompass the exceptions of Article 33(2) RC (cf. number [594] below).
- ¹¹⁷ Article 23(2) QD.
- ¹¹⁸ A predecessor to the quoted phrase run as follows: “[...] *unless such family members already enjoy more favourable benefits pursuant to other provisions of Community law*” (Council doc. 5813/03, Asile 7 of 5 February 2003, Article 21A).
- ¹¹⁹ Article 23(2) QD.
- ¹²⁰ Article 25(2)(d) PD; cf. number [428].
- ¹²¹ Article 23(4) QD.
- ¹²² The implications of the term “may” are discussed under number [674].
- ¹²³ Article 23(5) QD.
- ¹²⁴ Article 23(1) QD.

- ¹²⁵ Cf. Article 23(4) QD.
- ¹²⁶ As Article 23(2) refers to Articles 24 to 34 QSD, not to Article 21 QD.
- ¹²⁷ Article 1 FRD.
- ¹²⁸ Article 2(d) FRD.
- ¹²⁹ Article 3(1) FRD.
- ¹³⁰ Article 3(1) and 9(1) FRD. According to Article 8(1) FRD Member States may set the additional condition that the sponsor has stayed in their territory for a certain time span (with the maximum of two years), but this requirement can not apply to refugees (Article 12(2) FRD).
- ¹³¹ Cf. Article 9 FRD.
- ¹³² Article 2(b) FRD.
- ¹³³ Article 4(1)(a)-(c) FRD.
- ¹³⁴ Article 4(1)(b)-(d) FRD.
- ¹³⁵ Article 4(1), second paragraph FRD. The last clause of the same provision holds that Member States may require that children older than 12 years meet integration conditions, but this does not apply to children of refugees pursuant to Article 10(1) FRD.
- ¹³⁶ Article 10(3)(a) FRD; unlike in case of other minor sponsors, these “first degree relatives” need not be dependant upon him.
- ¹³⁷ The implications of the term “may” are discussed under number [674].
- ¹³⁸ Article 10(3)(b) FRD.
- ¹³⁹ Article 4(3) FRD.
- ¹⁴⁰ Article 4(2) FRD.
- ¹⁴¹ Article 4(4) and 6(1) FRD.
- ¹⁴² Article 6(2) FRD.
- ¹⁴³ Article 17 FRD.
- ¹⁴⁴ Article 12(1) read in conjunction with 7 FRD.
- ¹⁴⁵ Article 12(1) second clause FRD.
- ¹⁴⁶ Article 13(2) and 15(1) FRD; according to the latter provision, the issue of the autonomous residence permit may be limited to spouses or unmarried partners in case of broken relationships.
- ¹⁴⁷ Article 14(1) FRD.
- ¹⁴⁸ Article 14(2) and (3) FRD.
- ¹⁴⁹ Article 16(1) – (3) FRD.
- ¹⁵⁰ Article 5(1) FRD.
- ¹⁵¹ Article 4(3) FRD. According to the same provision, “in appropriate circumstances”, Member States may deal with requests concerning family members already present.
- ¹⁵² Article 11(1) FRD; the provision adds that “*A decision rejecting an application may not be based solely on the fact that documentary evidence is lacking*”.
- ¹⁵³ Article 5(2) FRD.
- ¹⁵⁴ Article 5(4) FRD.

¹⁵⁵ Ibid.

¹⁵⁶ Article 18 FRD.

¹⁵⁷ In ECtHR 13 May 2003, Appl. No. 53102/99 (decision) (*Chandra v. The Netherlands*), the Court observes that “*It has not been argued that these children could not stay with their father [in the country of origin Indonesia]*”.

¹⁵⁸ In *Chandra v. The Netherlands* and ECtHR 25 March 2003, Appl. No. 41226/98 (decision) (*I.M. v. The Netherlands*), the European Court of Human Rights mentioned the lapse of four years in the first, and six and a half years in the latter case as a material consideration for finding that Article 8 ECHR had not been violated.

¹⁵⁹ Article 9(2) FRD.

¹⁶⁰ Article 4 FRD, see number [583] above.

¹⁶¹ Article 2(h) second indent QD speaks of “children of the couple”, and does not refer to adopted children; cf. number [580].

¹⁶² Article 23(1) QD speaks of “family unity”. The term “family” is not defined in the Qualification Directive. The provision therefore may apply to relatives who do not qualify as “family members” pursuant to Article 2(h) QD as well.

¹⁶³ Article 4(3) FRD.

¹⁶⁴ Cf. Hathaway 2003, p. 12.

¹⁶⁵ Cf. Council doc. 9038/02 Asile 2002/25 of 17 June 2002, p. 4n; Article 2(j) of the subsequent Draft Qualification Directive, Council doc. 10956/02, Asile 2002/36 of 9 July 2002 p. 4 contained (with slight differences) the text of Article 2(h) QD as adopted.

¹⁶⁶ Cf. Article 2(d) RSD.

¹⁶⁷ Article 14(5) read in conjunction with 14(4) QD, cf. number [342].

¹⁶⁸ The Article 14(6) QD status applies to “persons” whose Directive refugee status is revoked, ended or not renewed pursuant to Article 14(4) QD. By virtue of the (terminated) status, these refugees have been formally recognised. The Article 14(6) QD status may further apply when Member States, pursuant to Article 14(5) QD, “*decide not to grant status to a refugee, where such a decision has not yet been taken*”. This second category therefore concerns persons whom the Member States have sorted out are “refugees”, hence fulfil the requirements of Article 1 RC. Preamble recital (23) QD to the Qualification Directive states that “*As referred to in Article 14, ‘status’ can also include refugee status*”. The statement is somewhat confusing as Article 14 addresses, according to its heading, “refugee status”. Arguably, we should read the quoted Preamble recital as stating that the decision ex Article 14(5) QD to “not grant status to a refugee” encompasses next to the decision not to grant “refugee status” for the purposes of the Directive, a negation of recognition of refugee status in the sense of the Refugee Convention.

¹⁶⁹ Articles 3, 5, 13, 27, 4, 20, 22, 29, 30, 31, 33, 34 RC.

¹⁷⁰ Articles 12, 14, 16(2) and (3) and 25 RC. – There are no Refugee Convention benefits applying to recognised refugees *tout court*.

- ¹⁷¹ See on these requirements paragraph 6.5.1.
- ¹⁷² Cf. Article 21(2) QD, number [576] above.
- ¹⁷³ Article 2(a) read in conjunction with (d) QD.
- ¹⁷⁴ Preamble recital (6) QD.
- ¹⁷⁵ Cf. Grahl-Madsen 1963, Commentary on Article 33 RC under (8) as to “national security”, and on Article 32 under (6) as to public order, and Steenbergen et al. 1999, p. 164.
- ¹⁷⁶ Article 24(1) QD, that is in the English and French language versions – the Dutch and German ones do not contain the reference to Article 21(3) QD! This omission is of little practical importance, as Article 21(3) QD may serve as grounds for termination of a permit on its own terms
- ¹⁷⁷ Preamble recital (30) QD.
- ¹⁷⁸ Perhaps we should read the Preamble consideration otherwise: does it observe that when a refugee has not (yet) received a residence permit, he is not “lawfully” present for the purpose of Articles 17 and 24 RC, that address employment, social welfare and health care. Indeed, the refugees who are excluded under Article 24 QD are not (necessarily) lawfully present and therefore not (necessarily) entitled to the Refugee Convention benefits for lawfully present refugees. But that circumstance does not detract from their entitlement to relevant Qualification Directive benefits.
- ¹⁷⁹ Preamble recitals (5), (6) and (7) QD.
- ¹⁸⁰ Article 20(2) QD.
- ¹⁸¹ The latter ground for exception is stricter than and hence has little meaning next the grounds for exclusion or cessation of subsidiary protection status laid down in Articles 17(1) and (3) QD (cf. number [339] above).
- ¹⁸² Article 33(2) QD.
- ¹⁸³ Article 25(2) QD.
- ¹⁸⁴ Comments on Articles, p. 31.
- ¹⁸⁵ This connection is an odd one, as the possibility of getting documents from consular authorities depends on the identity of the agent of serious harm rather than on the type of serious harm.
- ¹⁸⁶ Preamble recital (34) QD explains that “*The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.*”
- ¹⁸⁷ Article 29(2) QD.
- ¹⁸⁸ Article 26(4) QD.
- ¹⁸⁹ Articles 2(h) and 23(3) QD.
- ¹⁹⁰ Article 23(2) first clause QD.
- ¹⁹¹ Article 23(2) second and third paragraphs QD.

- ¹⁹² It follows from the Preamble that they should also be “fair in comparison to those enjoyed by beneficiaries of subsidiary protection status” - Preamble recital (29) QD.
- ¹⁹³ Article 3(2) FRD.
- ¹⁹⁴ Cf. Article 3(1) FRD; see number [583] above.
- ¹⁹⁵ ECtHR 19 February 1996, *Rep.* 1996-I (*Gül*), par. 41.
- ¹⁹⁶ Article 3(1) RSD.
- ¹⁹⁷ Cf. Articles 2(b) and (c) RSD and 2(b) and (c) PD.
- ¹⁹⁸ Article 6(2) RSD. We may observe that the first category of applicants could not be “lawfully present” for the purposes of the Refugee Convention, but this does not necessarily hold true for the other two categories. An applicant whose application is examined at the border may possess a valid visa, and the same may hold true for the applicant in detention.
- ¹⁹⁹ See on the arrangement further paragraph 8.5.1.
- ²⁰⁰ Cf. Articles 6(1), 20(2), 26(b), 27(1)(b) PD.
- ²⁰¹ Preamble recital (5) RSD.
- ²⁰² Goodwin-Gill 2003, pp. 221f.
- ²⁰³ ExCom Conclusion No. 44 (XXXVII) of 13 October 1986, Detention of Refugees and Asylum Seekers, under (b).
- ²⁰⁴ Goodwin-Gill 2003, pp. 229-230.
- ²⁰⁵ Article 31(2) RC states in accordance with this provision that the restrictions on the freedom of movement may apply only until the refugee’s presence is authorised.
- ²⁰⁶ ECtHR 25 June 1996, *Rep.* 1996-III (*Amuur v. France*), par. 43.
- ²⁰⁷ In *Amuur v. France* (par. 48) the European Court of Human Right decided that “confinement” of applicants at the international zone at an airport by precluding them from entering the state amounted to deprivation of liberty and hence fell within the scope of the provision (in spite of the possibility to leave the state voluntarily).
- ²⁰⁸ Article 2 RC.
- ²⁰⁹ *Amuur v. France*, par. 45.
- ²¹⁰ Article 2(i) RSD.
- ²¹¹ Article 2(j) RSD.
- ²¹² Article 13(1) RSD. But Member States may make the provision of “material reception conditions” and “health care” subject to the condition that applicant cannot sustain a sufficient standard of living on his own means (Article 13(3) RSD).
- ²¹³ Article 7(4) RSD.
- ²¹⁴ Article 13(2) RSD. The provision makes this standard dependant on the circumstances: “Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with Article 17, as well as in relation to the situation of persons who are in detention.”
- ²¹⁵ Article 13(5) RSD.
- ²¹⁶ Article 14(2)(a) and (3) RSD.

- ²¹⁷ Article 14(4) RSD.
- ²¹⁸ Article 14(6) RSD.
- ²¹⁹ Article 14(8) RSD; they may do so “*when an initial assessment of the specific needs of the applicant is required, material reception conditions, as provided for in this Article, are not available in a certain geographical area, housing capacities normally available are temporarily exhausted, or the asylum seeker is in detention or confined to border posts.*”
- ²²⁰ Articles 21 and 23 RC.
- ²²¹ Hathaway 2003, p. 12.
- ²²² Hathaway 2003, *l.c.*
- ²²³ Whether Article 11 RSD sets a minimum standard is discussed under number [673].
- ²²⁴ Articles 15 and 20 RSD.
- ²²⁵ Article 17(1) RSD.
- ²²⁶ Article 18(1) RSD.
- ²²⁷ Article 19 RSD; cf. Article 30 QD.
- ²²⁸ Preamble recital (12) RSD.
- ²²⁹ Article 16(1) RSD.
- ²³⁰ Article 16(1)(a) and (2) RSD; further, they may do so “*where an applicant has concealed financial resources and therefore unduly benefited from material reception conditions,*” or in case of “*serious breaches of the rules of the accommodation centre or to seriously violent behaviour*” (Article 16(1)(b) and (3) RSD).
- ²³¹ Hathaway 2003, pp. 12-13.
- ²³² Cf. Articles 20 and 23(4)(i) PD, cf. number [429].
- ²³³ Cf. Article 3 RSD read in conjunction with 6(1) PD.
- ²³⁴ Article 7(4) RSD.
- ²³⁵ Article 7(5) RSD.
- ²³⁶ Article 16(4) RSD.
- ²³⁷ Articles 3A(1) and 7(2)(a) PD; cf. number [390].
- ²³⁸ Articles 14(5) and 19(4) RSD.
- ²³⁹ Cf. ECtHR 5 February 2002, *Rep.* 2002-I (Čonka), pars. 44-46, and ECtHR 9 January 2003, Appl. No. 55263/00 (*Kadem v. Malta*), par. 53.
- ²⁴⁰ Article 3(1) RSD.
- ²⁴¹ Save for Article 8 RSD that states that “*Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the asylum seeker’s agreement*”.
- ²⁴² Cf. Article 2(i) DR.
- ²⁴³ Article 6 read in conjunction with 2(i)(iii) DR.
- ²⁴⁴ This requirement is not explicitly stated, but Articles 7 and 8 both address situations where

the family member is legally present in a Member State, the situation addressed in Article 6, and they do not come into play if Article 6 is applicable (cf. Article 5(1) DR).

²⁴⁵ Article 7 DR; this rule applies regardless of whether the family ties existed in the country of origin.

²⁴⁶ Article 8 DR.

²⁴⁷ I.e. when “*several members of a family submit applications for asylum in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together*” (Article 14 DR).

²⁴⁸ Article 15(3) DR.

²⁴⁹ Article 15(2) DR.

²⁵⁰ Article 11(1) Dublin Application Regulation. The same provision further mentions other “points” that “shall be taken into account” when assessing the “necessity” of reunification on the basis of Article 15 DR.

²⁵¹ But the assumption would not be “manifestly unfounded” (Article 35(3) ECHR), for in its decisions of 23 September 2003 in the case of *N v. Finland* (Appl. No. 38885/02), the Court declared admissible a complaint under Article 8 ECHR by a failed asylum seeker who enjoyed family life in Finland with another asylum seeker, whose case was still pending.

²⁵² HRC 29 October 2003, CCPR/C/79/D/1069/2002 (*Bakhtiyari*).

²⁵³ *Bakhtiyari*, par. 9.6.

²⁵⁴ *Ibid.*

²⁵⁵ Preamble recital (7) RSD.

²⁵⁶ Cf. Chapter 2.3.4 and 4.4.

²⁵⁷ Handoll 2004, pp. 143-4.

²⁵⁸ Preamble recital (8) RSD.

²⁵⁹ Cf. Preamble recital (3) RSD.

²⁶⁰ Cf. Articles 11 and 12 RSD; see above number [609].

²⁶¹ An applicant for temporary protection is by definition an applicant for protection under the Refugee Convention in Member States that run a single procedure for examining applications for both forms of protection but this does not hold true for Member States that run separate procedures (see number [263]). In case of separate procedures, the temporary protection beneficiary who deliberately did not apply for refugee status would nevertheless qualify as an unrecognised refugee pursuant to the Temporary Protection Directive (see below in the main text).

²⁶² Article 4(1) TPD.

²⁶³ Article 2(c) TPD.

²⁶⁴ Article 2(e) TPD.

²⁶⁵ Article 2(c) TPD.

²⁶⁶ Preamble recital (10) TPD.

²⁶⁷ *Ibid.*

²⁶⁸ Article 4 read in conjunction with 6 TPD.

- ²⁶⁹ Article 8(1) TPD.
- ²⁷⁰ Article 8(2) TPD.
- ²⁷¹ Article 3(3) RSD.
- ²⁷² Article 3(2) TPD.
- ²⁷³ Article 8(1) TPD.
- ²⁷⁴ Article 14(1) TPD; cf. Article 27(1) QD, number [577].
- ²⁷⁵ Article 14(2) TPD.
- ²⁷⁶ Article 12 TPD.
- ²⁷⁷ Article 26 QD; cf. number [577].
- ²⁷⁸ Article 12 TPD: “*For reasons of labour market policies, Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third country nationals who receive unemployment benefit. The general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply*”; cf. Article 26(3) QD and 11(4) RSD, on subsidiary protection and applicant status beneficiaries (cf. numbers [597] and [609]).
- ²⁷⁹ Article 13(1) TPD.
- ²⁸⁰ Article 13(2) TPD.
- ²⁸¹ Articles 8(1) and 9 TPD.
- ²⁸² Article 13(4) TPD.
- ²⁸³ Article 16 TPD; cf. Articles 30 QD and 19 RSD and numbers [578] and [609] above.
- ²⁸⁴ Article 3(2)(b) FRD.
- ²⁸⁵ Article 15(2) and (3) TPD.
- ²⁸⁶ Article 15(1)(a), (2) and (3) TPD.
- ²⁸⁷ *Ibid.*
- ²⁸⁸ Article 15(1) TPD; cf. Article 2(d) FRD and number [582].
- ²⁸⁹ Article 15(2) and (3) TPD.
- ²⁹⁰ ECtHR 19 February 1996, *Rep.* 1996-I (*Gül*), par. 41.
- ²⁹¹ Cf. Preamble recital (5) QD.
- ²⁹² Article 3(1) FRD, see number [582].
- ²⁹³ As observed under number [353], persons to whom refugee or subsidiary protection status has been granted are not therefore excluded from temporary protection. If both statuses concur, the alien can thus claim reunification with family members in accordance with Article 15 TPD.
- ²⁹⁴ Preamble recital (27) QD: “*Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status*”.
- ²⁹⁵ Articles 4(1)(b), (c), (d) and (2)(b) FRD, 15(1)(a) TPD, 2(i)(ii) DR.
- ²⁹⁶ Cf. Preamble recital (5) QD, and cf. Article 266(1) CfE.

Chapter 9

Judicial supervision

In Chapters 6 and 8, the rules of the Procedures Directive and other asylum legislation on remedies before domestic courts from negative decisions upon applications for asylum, and from denial of certain secondary rights were discussed. In this Chapter, I will address other issues of judicial protection within the Community legal order. In paragraph 9.1, the general set-up of the Community system of judicial review is addressed, in particular the rules on access to the Court of Justice. In paragraph 9.2, I will address the question how domestic courts can or must give effect to Community law. In paragraph 9.3, I discuss the scope of acts that may be reviewed for their accordance with international asylum law by the Court of Justice. The consequences of rulings on interpretation and application of international asylum law by the latter Court for review of compatibility with international law by domestic courts is the subject of paragraph 9.4. In paragraph 9.5, I discuss the consequences of European asylum law and, in particular, of the judicial competencies of Court of Justice for the individual's access to the European Court of Human Rights.

9.1 Judicial protection of Community rights

9.1.1 The principle of effective protection

[631] The Community system of judicial protection is based on the principle that all “individuals are entitled to effective judicial protection of the rights they derive from the Community legal order”.¹ This right is a general principle of Community law, also enshrined in the Articles 6 and 13 of the European Convention of Human Rights.² Redress in individual cases is provided for by a two-prong system. First, on the basis of Articles 230 and 232 TEC individuals can appeal directly to the Court of Justice or the Court of First Instance against certain types of decisions by Community institutions, or against their failure to act. Second, the legality of other acts within the scope of Community law can be challenged before domestic courts, which then function as the local branches of the Community judiciary.³ Domestic courts are obliged to apply Community law, and hence to protect the rights to which individuals are entitled. Further, if in domestic proceedings questions arise on the interpretation or validity of Community law, domestic courts can or must refer those issues for preliminary ruling to the Court of Justice, pursuant to Article 234 TEC. By these two procedures

“the Treaty established a complete system of legal remedies and procedures to design to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application of measures against them which they cannot contest directly before the court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 [now 230, HB] of the Treaty.”⁴

Direct appeal to the Court of Justice and remedies before domestic courts hence function as communicating vessels. If direct appeal to the Luxembourg Courts is barred by admissibility requirements, domestic courts must offer access. If appropriate, domestic courts must turn to the Court of Justice for guidance pursuant to Article 234 TEC. In this way, both effective judicial protection and supervision by the Court of Justice is secured.

Whether persons in need of protection can lodge direct appeals concerning European asylum law to the Court of Justice will be discussed in paragraph 9.1.2. If it turns out that such direct appeal is not possible, the requirements of Community law on appeals to domestic courts (the alternative branch of the judicial system) will be addressed in paragraph 9.1.3. The supervision over European asylum law by the Court of Justice pursuant to Article 234 (read in conjunction with 68) TEC is discussed later, in paragraph 9.3.

9.1.2 Direct appeal to the Court of Justice

[632] Review of legality of acts by Community institutions entails review of compliance of secondary Community law with primary Community law, including international asylum law that works within the Community legal order.⁵ The review of legality by the Court of Justice pursuant to Article 230 TEC is in several ways limited.⁶ To begin with, the provision allows for appeal to the Court of Justice only against acts of the Community institutions, not against acts of (organs of) the Member States. Further, an individual has standing only if, first, the act of the Community institution is a “decision addressed to” him; or second, if the act is a regulation that is of “direct and individual concern” to him – in fact, a decision dressed in the form of a regulation.

Could acts of Community institutions in the realm of asylum law qualify as “decisions” for the purposes of Article 230 TEC? Under European asylum law, decisions that are “addressed” to individual persons in need of protection (such as decisions on an application for asylum, or the grant or refusal of secondary rights) are taken by organs of the Member States. Neither the Treaty, nor

European asylum law empowers a Community institution to take decisions that address specific individuals in need of protection. Thus, persons in need of protection cannot lodge direct appeal to the Court of Justice on this footing.

The second type of acts that are open to direct appeal to the Court of Justice concerns regulations that are “of direct and individual concern” to an individual. A person is “directly concerned” for the purposes of Article 230 TEC only if the regulation does not leave the national authorities any discretion in its application.⁷ In *Plaumann*, the Court ruled that a person is not “individually” concerned, if “the measure applies to objectively determined situations and produces legal effects with regards to categories of persons described in a generalised and abstract manner”.⁸ Even if it is possible to determine the number or even identity of the persons affected by a measure, such persons are not necessarily individually concerned.⁹ Obviously, no piece of legislation¹⁰ in the realm of asylum could possibly pass this test. As to the Dublin Regulation, Articles 3(2) and 15 in particular, leave the Member States the power to decide on any application for asylum, even if another Member State is “responsible” for doing so according to the Dublin criteria.

[633] The same reasoning applies to the “decisions” that Community institutions are competent to take on the basis of European asylum legislation. It concerns the lists of safe third neighbour countries (Article 35A PD, see number [533]) and of safe third countries of origin (Article 30 PD, see number [446]); and the Council “acts” that should provide for guidance that Member States should take into account when assessing whether an international organisation controls a state (Article 7(3) QD; see number [316]). The adoption of such a list is not a decision that is “addressed” to particular persons. Again, the legality of such acts can be challenged. For if a Member State refuses protection to an individual because he comes from a country that occurs on the “minimum common list” of safe countries of origin, the alien can challenge that decision before a domestic court. If the applicant alleges that the list is not in accordance with the Refugee Convention because his country of origin is very unsafe, the domestic court can refer a preliminary question on the validity of the list to the Court of Justice. The same reasoning applies to the list of safe third countries and the Council acts on actors of protection.

[634] Article 232 TEC allows individuals to appeal to the Court for failure to act by Community institutions.¹¹ For persons in need of protection, this course of action could be relevant in case of failure to establish temporary protection. The Council introduces temporary protection upon a proposal by the

Commission. Could an applicant appeal on this basis against the Commission because it does not lodge a proposal for protection that would apply to him, or against the Council because it does not adopt a proposal by the Commission that applies to him?

The appeal would be inadmissible, if only because for individuals the right to appeal ex Article 232 TEC is restricted in the same way as the right to challenge the legality under Article 230 TEC.¹² Temporary protection can be installed in case of a “mass influx”, that is, in terms of the *Plaumann* formula, for “categories of persons described in a generalised and abstract manner”, not for specific individuals.

[635] Finally, we should address the question of whether legal persons, such as organisations for the protection of the interests of refugees, could appeal on the basis of Article 230 or 232 TEC. If domestic procedural law denies such organisations access to domestic courts, they should have access to the other branch of the Community judiciary system, so one may argue. However, the requirement of “direct and individual concern” applies to such organisations as well; their appeals are inadmissible if the decision (or regulation) concerns general interests of the represented individuals, and those individuals do not have standing individually.¹³ Hence, such organisations have standing only if the refugees they represent do.

In summary, none of the instruments of European asylum law are open to direct appeal before the Court of Justice. We should observe that this does not in itself affect the effectiveness of the judicial protection of the individual’s rights under European asylum law. It only follows that persons in need of protection should turn to the other branch of the Community judiciary system, the domestic courts, which could bring the question on the validity of the Community measure before the Court of Justice.¹⁴ The narrow scope of Article 230 TEC is therefore not an obstacle to the review of legality of Community legislation.

9.1.3 Requirements on remedies in domestic courts

[636] As individuals cannot approach the Luxembourg Courts directly in case of infringement of their asylum rights, domestic law must provide for remedies and procedures which ensure protection of those rights. Community law requirements on those domestic procedures result from application of two conflicting principles.

On one hand, Article 10 TEC imposes the obligation on domestic courts to ensure effective judicial protection of the rights to which individuals are entitled under Community law,¹⁵ which implies strict requirements of Community law on domestic procedures. But the subsidiarity principle points in the opposite direction. According to this principle (as laid down in Article 5 TEC, quoted under number [56]), in areas outside its exclusive competence, such as domestic procedural law, the Community should not take action if the objectives of Community law can be sufficiently achieved by the Member States themselves. In the area of domestic procedural law, the subsidiarity principle takes the shape of the principle of “procedural autonomy”: it is the domestic legal system that shapes judicial protection to individuals against infringement of their rights under Community law.

As a consequence, the case law of the Court of Justice on domestic procedures offers a mixed picture. In some cases, it relies heavily on the effectiveness principle, and has even demanded that remedies hitherto unknown under domestic procedural law were established.¹⁶ In other cases, the procedural autonomy of the Member States was stressed.¹⁷

But this autonomy is not unfettered, as it is always subject to two conditions.¹⁸ First, domestic remedies for enforcement of rights pursuant to domestic law must apply without discrimination to enforcement of rights under Community law (the principle of non-discrimination or equivalence). Second, domestic procedural rules should not make the exercise of rights derived from Community law impossible in practice (the principle of effectiveness *stricto sensu*).

[637] The Court offered a model for balancing the involved principles in *Van Schijndel* and subsequent case law.¹⁹ According to these cases, the principle of procedural autonomy applies *prima facie*, but it is qualified by the principles of equivalence and practical effectiveness under a two-step test. Thus, a rule of domestic procedural law barring application of a rule of Community law in a specific case must be set aside only when it does not pass this test. In the first step of the test, the domestic court must apply the equivalence principle. It entails that the court has to apply the rule of Community law invoked in the case at hand, if it would have to apply an equivalent rule of domestic law. If it does not have to apply the rule, it must proceed to the second step. Here it must balance the restriction imposed on the enforcement of the Community right invoked with the purpose and role of the domestic rule barring its application.

The result of this test obviously depends on the rules of domestic and

Community law involved. *Van Schijndel* concerned a rule of Dutch law that forbade the national court from raising issues of law on its own motion, except for rules of public interest. The Court of Justice ruled that the interests which this domestic rule sought to protect (such as the interests of the defence and protection from delays) justified the limitation on the application of Community competition law in the concerned case. In other cases, it seems that the nature of the Community right involved decided in favour of the effectiveness principle.

[638] What implications does the Court's case law on domestic procedural law entail for enforcement of European asylum law? First and foremost, that Community law does have consequences and sets requirements on domestic asylum proceedings pursuant to the principle of effectiveness - thus apart from the rules on asylum procedures laid down in Community legislation. If in a specific case Community legislation on asylum procedures does not apply, domestic rules that bar application of European asylum law must be tested against the effectiveness principle. Hence, in states where the Procedures Directive does not apply to procedures for the granting of subsidiary protection status (cf. number [262]), applicants for that status can claim "effective judicial protection" of their right to subsidiary protection status ex Article 18 QD (cf. number [275]). Likewise, although European asylum law does not state procedural rules on the issue of the dependant statuses for family members of refugee or subsidiary protection status beneficiaries, these family members may rely on the principle when their applications are turned down (cf. number [580]).

However, the very nature of the test described above stands in the way of formulating a general set of procedural standards. Because of the balancing test through which the effectiveness principle is applied, the outcome depends on the purpose of the domestic rule on the one hand, and on the nature of the involved rule of Community law on the other.

Does the competence of the Community to adopt legislation on procedures pursuant to Article 63(1)(d) TEC influence the effectiveness test that the Court applies? Obviously, legislation within the scope of the Directive on procedures is subject to a far more penetrating review by the Court. Such legislation must comply with the Directive, and it must be in accordance with relevant international asylum law (cf. Article 63(1) TEC). Issues not addressed by the latter Directive still lie within the scope of the Member States' competences. This is underlined by the characterisation of Community legislation pursuant to Article 63(1)(d) TEC as minimum standards. Within that scope the Member

States still enjoy procedural autonomy – conditioned by the principles of non-discrimination and effectiveness.

9.1.4 Concluding remarks

[639] Community law requires an effective judicial protection of the rights which individuals derive from Community law, either by direct appeal to the Luxembourg Courts, or from domestic courts. The admissibility criteria of Articles 230 and 232 TEC bar direct appeal to the Luxembourg Courts where European asylum law is concerned. Hence, judicial protection must be sought from domestic courts.

Domestic procedural law applies to such proceedings, but is conditioned by the principle of equivalence between domestic and Community law, and the principle of effectiveness. The obligation to provide for an effective remedy applies not only to the subject matter explicitly addressed in secondary legislation on asylum. Hence, in states where the Procedures Directive does not apply to procedures for the granting of subsidiary protection status, applicants for that status can claim “effective judicial protection” of their right to subsidiary protection status ex Article 18 QD; family members of refugee or subsidiary protection status beneficiaries to whom a derivative status is denied may do the same.

9.2 Direct and indirect effect of European law on asylum

The effect of Community law

[640] Article 10 TEC requires that the legislator, executive and judiciary of the Member States apply Community law; moreover, any rule of Community law is superior to any rule of domestic law (number [56]). It follows that domestic authorities, including courts, have the obligation to give effect, if possible, to Community law and to cede precedence to Community law if domestic law is not in conformity with it.

European asylum law can have effect in the domestic legal orders of the Member States in two ways.²⁰ First, it can have a “direct effect”. If a provision of Community law has direct effect, individuals can invoke it before domestic courts. Second, by virtue of the principle of “conciliatory (or consistent) interpretation”,²¹ domestic courts must apply domestic law in accordance with Community law. The rule of Community law then has effect as it steers the

application of the rule of domestic law. But it is the latter that is applied, not the rule of Community law. Therefore, this way of giving effect to Community law has been labelled “indirect effect”.²²

Below, I will discuss indirect effect of asylum law in paragraph 9.2.1, and direct effect in paragraph 9.2.2. The effect of directives during the period for transposition is addressed in paragraph 9.2.3. The findings are summarised in paragraph 9.2.4, where the order of precedence between indirect and direct effect is addressed.

9.2.1 Indirect effect

[641] According to the principle of conciliatory interpretation, domestic courts must as far as possible read domestic law in accordance with Community law. Conciliatory interpretation concerns in particular Community directives, but may apply to Treaty provisions as well.²³ The obligation applies to directives that were correctly implemented, as well as to incorrectly implemented ones, and to domestic law from before as well as from after the Community measure.²⁴ Indirect effect or conciliatory interpretation is not restricted to a specific type of rules of Community law. In particular, domestic courts must also read domestic law in accordance with Community law that lacks direct effect.²⁵

Thus, all rules of European asylum law are capable of having an indirect effect. But it does not follow that they have an indirect effect in each and every case. In *Von Colson*, the Court of Justice stated that domestic courts had to interpret domestic law in conformity with a directive “in so far as it is given discretion to do so under national law.”²⁶ In later judgements, it spoke of an obligation to do so “as far as possible”.²⁷ According to *Jans et al.*, this phrase refers to the constraints that domestic constitutional law may impose: extensive interpretation by courts may run down, or come close to, legislative activity which domestic constitutional law may forbid.²⁸ Prinssen however points out that the phrase “as far as possible” is far less explicit than the one applied in *Von Colson*; in particular, it leaves uncertain whether the limits to the “possibility” to apply the principle of conciliatory interpretation are set by domestic law (as *Jans et al.* suggest) or by Community law.²⁹

As to Community law, the Court of Justice has indicated that the obligation to give indirect effect to Community law is restricted “in particular by the principles of legal certainty and non-retroactivity”.³⁰ Most authors hold that at any

rate *contra legem* application of domestic law is not required and that conciliatory interpretation of a directive that has not yet been implemented may not result in imposing obligations upon individuals.³¹ All case law on these constraints however concern criminal law, and it is unclear whether it applies at all, or in the same way in other realms of law.³²

[642] Are these restraints to conciliatory interpretation relevant for European asylum law? The rules on qualification for protection do not imply obligations for the applicant, so the indirect effect of those rules would not adversely affect his legal certainty. The same holds true for most rules on procedures and secondary rights. But conditions for the grant of those secondary rights as well as some procedural rules do imply obligations for the alien. For example, “the obligations of the applicants for asylum” laid down in Article 9A PD require that he co-operates with and, if ordered to, reports to the competent authorities.³³ Failure to do so may lead to a negative decision.³⁴ Arguably, conciliatory interpretation of domestic law with these provisions to the effect, that an application is dismissed because of failure to comply with reporting duties would be at variance with the Community principle of legal certainty.

As far as domestic law informs the limits to conciliatory interpretation, its relevance for European asylum law cannot be definitely addressed here. But situations wherein conciliatory interpretation of European rules on examination would lead to *contra legem* reading of domestic law are harder to imagine. For domestic law will not usually prohibit the executive from granting asylum statuses, but rather state on which conditions the status must be granted. Arguably, at any rate, the rules on qualification can always be given indirect effect. The matter may be different where domestic law does not provide a proper basis for the issue of secondary rights. In such a case, the direct effect of the concerned provisions of Community law becomes most relevant.

9.2.2 Direct effect

A rule of Community law that has a direct effect can be applied by domestic courts to cases before them, and hence be relied upon by individuals. In the case that a rule that has a direct effect conflicts with a rule of domestic law, it has precedence pursuant to the principle of supremacy of Community law: the domestic rule cannot apply. Criteria of Community law (not domestic law) decide whether a Community rule has direct effect or not. In paragraph 9.2.2.1

I address these criteria, in paragraphs 9.2.2.2-4 I discuss direct effect of European asylum law.

9.2.2.1 The conditions for direct effect

[643] A provision of Community law is directly effective if a court can apply it to a case before it without transgressing the boundaries of its judicial position.³⁵

“provided and in so far as a provision of Community law is sufficiently operational in itself to be applied by a court, it has direct effect. The clarity, precision, unconditional nature, completeness or perfection of the rule and its lack of dependence on discretionary implementing measures are in that respect merely aspects of one and the same characteristic feature which that rule must exhibit, namely it must be capable of being applied by a court to a specific case”.³⁶

But if and insofar as a rule leaves the Member States discretion, and thus real choices for observing their obligations under Community law, it lacks direct effect.

The classical test developed by the Court of Justice for determining whether or not a provision has direct effect consists of two cumulative criteria: the provision must be “sufficiently precise” and it must be “unconditional”.³⁷ The precision requirement concerns the wording of the provision.³⁸ This condition is fulfilled if the wording is unequivocal. But ambiguous or vague wording does not necessarily bar a provision from being directly effective, for the ambiguity may be solved by interpretation. If however it turns out that the wording hides discretion for the Member States, the provision is not directly effective.

As to the second requirement, a provision is unconditional if no reservation has been made for implementation, which leaves discretion. The fact that it is subject to conditions – a transposition term, factual conditions, and reservations – is not decisive, for once the condition is fulfilled, the provision may be directly effective.

Further, provisions that allow (some) discretion do not necessarily block direct effect. If a directive contains a primary norm that is sufficiently precise and unconditional, but states some proviso that allows the Member States to depart from it in certain cases, the primary norm has direct effect if the application of the proviso is amenable to review by the courts.³⁹ If a directive leaves the Member States some discretion, it may nevertheless have direct effect if it

is possible to deduce some minimal standard from it.⁴⁰ Finally, if a provision that leaves discretion to Member States is the sole obstacle to direct effect, the directive may nevertheless become directly effective in Member States that make full use of that discretion.⁴¹

[644] Provisions that leave Member States discretion do not, in principle, have a direct effect. In principle, for such a provision may very well at the same time set a definite boundary to the exercise of that discretion:

“[...] where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive”.⁴²

In this type of situation, the domestic court is in fact required to check whether the national legislator or executive remained within the boundaries of Community law when exercising his competence. It follows that the same directive provision can have direct effect in one situation, but lacks it in another, for if the Member State remained within the boundaries of discretion conferred on it, there is no place for the court to intervene. Then, the individual cannot successfully invoke the provision. But if the state transgressed that boundary, the court can intervene and apply the rule of Community law – or, put differently, give direct effect to it.

[645] The examination of whether a rule of Community law has direct effect or not is to a large extent conditioned by the type of instrument involved, that is (for present purposes) the Treaty on European Community, a regulation, or a directive.

When addressing the direct effects of Treaty provisions, the Court of Justice in principle applies the precision and clarity test.⁴³ Regulations are, according to Article 249 TEC, “directly applicable” in the Member States: no transposition is needed (or even allowed, see number [58]). Consequently, there are no obstacles for a domestic court to the application of their provisions, i.e. no obstacles to their direct effect. Still,

“although, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems with-

out its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States.”⁴⁴

Regulation provisions are therefore in principle directly effective, but doubts may not be suitable for application by courts in cases where a provision explicitly leaves the Member States discretion. Then, the test of precision and clarity must be applied to sort out whether or not it has direct effect.⁴⁵

Most complicated is the determination of direct effect of directive provisions. Directives are addressed to the Member States, leaving them “the choice of form and methods” to achieve the result proscribed (Article 249 TEC). As directives call for implementing measures by the Member States, they are designed to apply indirectly. Still, their provisions can have direct effect, if certain conditions are fulfilled.

To begin with, expiration of the transposition term. Directives leave Member States a certain time span to adopt or change legislation. Directive provisions cannot be invoked before the expiration of that time span (see, however, par. 9.2.3). If the implementation is correct, there is no room for direct effect – the individual relies on the domestic rule implementing the directive, interpreted if necessary in accordance with the directive.⁴⁶ But if a provision has been implemented incompletely or incorrectly, or has not been implemented at all, individuals can invoke it against domestic legislation – provided that the provision fulfils the requirements of sufficient precision and clarity. In those circumstances, the provision can be invoked against both later legislation, i.e. legislation intended to implement the provision, and against anterior domestic legislation. Conversely, if a directive has not been implemented, it cannot impose obligations upon individuals.⁴⁷ Thus, state organs cannot rely on the direct effect of obligations of applicants in the asylum procedure (cf. number [642] above).

9.2.2.2 Article 63 TEC

[646] Does Article 63 TEC have direct effect? The provision requires adoption of “standards”, and hence implementation, which includes the exercise of discretion.⁴⁸ Thus, the provision is not unconditional. This, however, does not preclude the possibility that elements of the provision may have a direct effect: if it is possible to isolate a rule of sufficient precision and clarity from a provision otherwise leaving discretion, this rule has direct effect.⁴⁹ Arguably, the

reference to international asylum law in Article 63(1) satisfies these conditions. The requirement of “accordance” is clear and unconditional. The same holds true for the requirement of compatibility with international agreements in the second final clause of Article 63. Hence, individuals can rely in court on the requirement of accordance and compatibility with international law.

9.2.2.3 Secondary law

The question of the direct effect of secondary law on asylum will in practice come up in two kinds of situation. First, in the case of a negative decision on an application for protection. In such cases, applicants may challenge such decisions relying on rules on qualification, allocation and on other grounds for refusal, as well as on procedural safeguards. Second, the issue may come up when secondary rights attached to CEAS statuses are denied.

Qualification

[647] As to rules on qualification, provisions on temporary protection in the Temporary Protection Directive cannot have a direct effect as they require implementation by a Council decision (see number [276]). The matter is different for qualification for refugee and subsidiary protection status. Articles 13 and 18 QD state that “Member States shall grant refugee status (subsidiary protection status) to any third country national or stateless person who qualifies as a refugee (eligible for subsidiary protection) in accordance with Chapters II and III PD (II and IV)”. In Chapters II to IV, elements of the definitions of refugee and person eligible for subsidiary protection are elaborated. It appears, that a person who fulfils those elements and qualifies as a refugee (or is eligible for subsidiary protection) in accordance with the Directive, has an unconditioned claim to refugee status (subsidiary protection).

At first sight, this conclusion is astonishing, because other European asylum legislation explicitly allows for negative decisions on requests for asylum, not addressed in Chapters II-IV of the Qualification Directive: the safe third country exception and other grounds for refusal (see number [373]). We should observe, however, that the scope of obligations under Articles 13 and 18 QD is restricted by Article 1 QD: both provisions can only set “standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection”.⁵⁰ Hence, *if* qualification takes place, third country nationals can rely on Articles 13 and 18 QD, but these provisions do not and cannot address the question *when* qualification

(must) take place – in the terms of Article 29(1) PD, when the Member States must address the question of whether the application is well-founded by virtue of the Qualification Directive. For requests for protection pursuant to the Refugee Convention, and partially for requests for subsidiary protection, the latter issue is addressed by Article 3(1) DR read in conjunction with 29(1) PD (see below number [650]).

[648] Thus, when a Member State decides upon examination that an application for refugee or subsidiary protection is unfounded, the applicant can rely on Articles 13 and 18 QD, and invoke his right to refugee or subsidiary protection status if he qualifies for it “in accordance with” Chapters II to IV QD. For our purposes, direct effect of provisions on qualification is relevant in cases where they set standards that require observance of international asylum law, or even exceed the standards of international asylum law. Of particular interest in this respect are the provisions on actors of persecution, on the Convention grounds “particular social group”, and on serious harm in case of indiscriminate violence (Articles 6, 10(1)(d) and 15(c) QD - see numbers [313], [327]-[328] and [305]). These provisions are, arguably, all worded in sufficiently precise and unconditional terms to have a direct effect. Thus, if an application is turned down as unfounded because some non-state actor committed the persecutory behaviour and no agent was able or willing to provide for protection, the applicant may rely on Article 6 read in conjunction with 13 or 18 against that negative decision.

[649] Other provisions are couched in vague terms that leave some discretion, but also sets limits to it that, arguably, have a direct effect (cf. number [644]). Thus, Article 5 QD does not give a precise and unconditional rule for when the need for protection arises *sur place*, but legislation that denies for practical purposes the possibility would be at variance with, especially, Article 5(2) last clause QD, which states that well-founded fear may “in particular” be based upon activities engaged in by the applicant since he left the country of origin if those activities “constitute the expression and continuation of convictions or orientations held in the country of origin.” The same reasoning applies for the indications of when “protection” from persecution or serious harm is “generally” provided, stated in Article 7(2) QD (see numbers [314] and [315]), and the circumstances to which the Member States must “have regard” according to Article 8(2) and 11(2) QD when deciding on the availability of an internal protection alternative or on cessation of refugee status (cf. numbers [322] and [346]).

Examination

[650] Most important among the rules on decision-making is the right to examination of the application on its merits pursuant to Articles 3(1) DR read in conjunction with 23(1) read in conjunction with 29(1) PD. As a regulation provision, Article 3(1) DR is “directly applicable”. It states in clear and unconditional terms that each application must be “examined”. The term “examination” however is vague: any decision on the application is an “examination”; moreover, the obligation does not apply in case the Member State expels the applicant to a third country (Article 3(3) DR; cf. number [521]). The obligation to examine is further defined in the Procedures Directive. Article 23(1) PD states in precise and unconditional wording that “Member States shall process applications for asylum in an examination procedure in accordance with” the requirements set out in Chapter II; according to Article 29(1), “Member states may only consider an application for asylum as unfounded if the determining authority has established that the applicant has not qualified for refugee status by virtue of [the Qualification Directive].” We saw in paragraph 6.2.2 that the obligations to perform the examination and to address qualification for refugee status are subject to a number of exceptions. But if application of these exceptions is amenable to judicial review, they do not affect the direct effect of Articles 3(1) DR, 23(1) and 29(1) PD (cf. number [643]).

[651] Among the exceptions to the obligation to examine whether the application for asylum is well-founded, are the variants of the safe third country exception discussed in Chapter 7. To begin with, the exception that applies in the case that another Member State is responsible for the examination.⁵¹ The Dublin Regulation determines in great detail and with precision when this ground for refusal applies (see par. 7.2.1). The relevant regulation provisions, the criteria for holding the other state responsible and the time-limits (see numbers [481] and [490]) do not require further measures of implementation that would block their “immediate effect”. Hence, application of the exception is amenable to judicial review.

As to the other exceptions to the obligation to examine the foundedness of applications for refugee status, a third country is safe for the purposes of Article 27 of the Procedures Directive “only” when applicants are treated there in accordance with the requirements set out under (1) (a) to (d). It is not required that it has been established that the country meets those requirements, but rather that “the competent authorities are satisfied” that it does. The latter phrase, arguably, entails discretion for those competent authorities, which is however limited by the mentioned requirements. Application is therefore

amenable to judicial review, which is confirmed by Article 27(2) and 38(3) PD (see number [527]). Application of the safe third country concept is subject to rules of domestic law (Article 27(2) PD first clause). Thus, Member States enjoy a certain amount of discretion in the matter. But this discretion is subject to the conditions set out in Article 27(2) under (a), (b) and (c) PD. In particular the condition that this domestic law must permit the applicant to challenge the safety of the third country on the ground that he will be subjected to ill-treatment there sets a boundary that is subject to judicial review.

The same issue arises for rebuttal of the presumption of safety of third neighbouring countries for the purpose of Article 35A PD (cf. paragraph 7.5.5). Article 35A(4) PD leaves the issue of “exceptions” to the application to domestic law, but requires that those “exceptions” are informed by “public international law” (the prohibitions of *refoulement*) and address “humanitarian and political reasons”. Domestic law that does not provide for these exceptions in a meaningful kind of way would exceed the boundaries of discretion. In this, the exception is amenable to judicial review.

As to the country of first asylum exception (par. 7.5.3), Article 26 under (a) PD as well as its third paragraph is quite precise and unconditional. The concept of “sufficient protection” in Article 26(b) seems to leave a certain amount of discretion, especially when read in conjunction with the last clause of the provision. But the provision requires that the protection includes “benefiting from the principle of non-*refoulement*”, which limit to Member State discretion is open to judicial review (cf. number [643]).

Two grounds of refusal on which the Directive elaborates were addressed in Chapter 6: subsequent applications and the safe country of origin issue. In this context, the standards for rebuttal of the presumption that no new facts arose or were presented, or that the country of origin is stated in Articles 30B(1) as well as 33(4) PD in precise and unconditional terms safe (numbers [456] and [436]), are relevant, which makes the provisions amenable to judicial review.

[652] In summary, Article 3(1) DR read in conjunction with 23(1) PD read in conjunction with 29(1) PD states in precise and unconditional terms that Member States must examine the foundedness of applications for refugee status. The multiple exceptions to this obligation are all amenable to judicial review, and therefore do not affect the direct effect of the mentioned provisions. We should observe that, read in conjunction with Article 13 QD, these provisions bestow an obligation to grant refugee status to any alien that applies for it within the European Union, to whom the mentioned exceptions do not

apply and who qualifies in accordance with chapters II and III QD. The same applies for claims to subsidiary protection status under Article 18 QD in states that run a combined procedure, hence where the Procedures Directive applies to any application for subsidiary protection status (number [263]). States that run separate procedures enjoy discretion as to the examination or not of applications for subsidiary protection.

[653] Finally, we should address the question of whether an applicant could claim that a Member State examines his application on the basis of Articles 3(2) or 15 DR. According to Article 3(2) DR, a Member State is competent to examine an application although another Member State is “responsible” according to the Dublin criteria. This competence is of particular interest in a case where expulsion to the responsible Member State would amount to indirect *refoulement*. As observed under number [520], European asylum law does not state criteria for deciding that another Member State is not safe for a particular applicant; the matter is therefore left to domestic law. In Member States that make use of this discretion and provide for domestic law that sets out when other Member States are unsafe for the purposes for the exception of the safe third country, the provision would gain direct effect (cf. number [643]).

Pursuant to Article 15(1) DR, a Member State “may bring together” relatives, that is, accept a relative of an alien present on its territory, “even” if it is not responsible for that relative and he did not lodge an application with it. Article 15(2) DR states when Member States “shall normally bring together” relatives, for example, if one of the relatives is dependent upon the other because of pregnancy or serious illness (see number [616]). Is this provision directly effective, so that relatives in these situations can claim reunion? According to Article 15(1) DR, the Member State that brings the relatives together examines the application for which it is not responsible “at the request of another Member State” (the responsible one or, eventually, a non-responsible State where the relative is present). Hence, the obligation to “normally” bring together relatives is subject to the requirement that a Member State requests so. The elaboration in the Dublin Application Regulation addresses the treatment of such a request as a purely inter state affair.⁵² The requirement that the persons concerned must give their “consent” for a transfer merely affirms this.⁵³ It follows that the applicant cannot require the transfer itself; he can merely require the Member State to make a request for transfer.

Procedural safeguards

[654] Article 23(1) PD requires that examination procedures are “in accor-

dance with the basic principles and guarantees set out in Chapter II”. This obligation is, just like the obligation to perform an examination of the merits, subject to a limited number of exceptions: it does not apply to the special procedures meant in Article 24 PD – the preliminary, the special border and the safe neighbouring third country procedures (see number [372]). But again, application of these exceptions is amenable to judicial review; they therefore do not block direct effect of Article 23(1) PD. Further, a number of procedural safeguards apply in the special procedures as well (see paragraph 6.2.4.3).

The safeguards that are most relevant for the compatibility of asylum procedures with relevant international asylum law are those laid down in Article 9 (on information on the procedure, services of an interpreter, and timely notice of the decision), 10 (on the personal interview) and 13 PD (on legal assistance; see paragraph 6.2.4.2). Articles 9 and 13(1) PD raise no particular questions: they are worded in sufficiently precise and unconditional terms. The same applies to the right to a hearing laid down in Article 10(1) PD. This right is subject to exceptions, but these address quite specific situations (see number [399]), amenable to judicial review. Moreover, certain exceptions may be applied only on the condition that the absence of a personal interview “shall not adversely affect” the examination (Article 10(5) PD; cf. number [400]). Arguably, this limit is open to judicial review as well. The same holds true for the further requirements on the personal interview that are laid down in Article 12(1) and (2) PD (cf. number [397]).

Likewise, Article 38(1) PD states in precise and unconditional terms that applicants are entitled to an effective remedy. Article 38(3) leaves the Member States some discretion as to the organisation of judicial scrutiny of the right to remain during appeal proceedings, but read in conjunction with Article 38(1) PD, the provision also limits this discretion: some provision for suspensive effect must be made that should be effective. This limit is, arguably, directly effective.

Secondary rights

[655] Most provisions on secondary rights of refugee status beneficiaries in the Qualification Directive state are worded in sufficiently precise and unconditional terms to have direct effect: Articles 21 (on *refoulement*), 22 (on information), 23(2) (on treatment of family members), 24(1) (on residence permits), 25(1) (on travel documents), 26(1) and (2) (on employment and related training), 27(1) (on education), 28(1) (on social welfare), 29(1) (on health care), 31 (on accommodation) and 32 (on freedom of movement) QD (see

numbers [576] and [577]). In particular, the definition of standards of treatment by reference to “nationals” and so on do not preclude direct effect, as they do not entail discretion on behalf of the Member States. These standards allow for differentiation among Member States, but at the same time fix the level of treatment for the individual Member States.

[656] A number of secondary rights for subsidiary protection beneficiaries are likewise formulated in precise and unconditional terms: Article 21, 22(2), 27(2), 31 and 32 QD (on *refoulement*, residence permits, education, accommodation and freedom of movement; cf. number [596]). Most provisions however leave the Member States a certain amount of discretion, which in turn is subject to certain conditions. Thus, Member States may define “conditions” that apply to benefits for their family members, but the benefits should still guarantee an adequate standard of living (Article 23(2) QD). They may make access to employment subject to “prioritisation”, but only under certain conditions (Article 26(3) QD, cf. number [597]). Welfare and health care may be restricted to “core benefits” (Articles 28(2) and 29(2) QD). The Preamble clarifies that the status should be “appropriate”, and that

“The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned”.⁵⁴

It follows that Member States do enjoy a certain amount of discretion as regards the grant of these benefits, but this discretion is subject to certain limits, which are amenable to judicial review (cf. number [597]).

[657] The same approach prevails in the Reception Standard Directive. The instrument requires that the issue of documentation, the granting of freedom of movement and access to schooling, housing and health care (Articles 7(1), 10(1), 13(1), 14 and 15 RSD; see par. 8.7.2). All these benefits are subject to exceptions or conditions that bestow a certain amount of discretion on the Member States, or they are worded in vague terms that imply a certain amount of discretion. But the restrictions on these conditions may have a direct effect. Thus, documentation may be refused, but only when the applicant is in detention, the application is examined in a border procedure or in “specific cases”.⁵⁵ Applicants could hence rely on the provision against domestic legislation allowing for refusal of documentation on a regular basis. The freedom of movement may be restricted, but only for specific pur-

poses.⁵⁶ Minor applicants have access to schooling under “similar”, not identical conditions as nationals: a vague term that implies some, but not unfettered discretion.⁵⁷ Likewise, Member States are left the choice to provide housing, food, clothing and health care in kind or in the form of allowances. But those reception conditions must be made “available”, “ensure a standard of living adequate for the health of applicants”, and be “capable of ensuring their subsistence”.⁵⁸

[658] All secondary rights attached to temporary protection status are obviously conditioned by the establishment of temporary protection. Once this condition is fulfilled, the relevant provisions may have a direct effect. The provisions that address the granting of residence permits and of documentation, access to schooling and family reunification (Articles 8, 9, 14 and 15(2) and (3) TPD; see numbers [621]-[622]) are stated in sufficiently precise and unconditional terms to have a direct effect. The provisions on access to employment, accommodation, welfare and medical care (Articles 12 and 13 TPD, see number [621]) require the issue of benefits, but state them in vague terms or allow for conditions that convey a certain amount of discretion whose limits may, again, have a direct effect. Thus, temporary protection beneficiaries must be given access to employment, but this access may be made subject to prioritisation of only certain groups of persons.⁵⁹ Accommodation must be “suitable”, “necessary assistance” must be issued in terms of welfare and subsistence.⁶⁰

9.2.2.4 Conclusions

[659] Most remarkable from the point of view of international law is the right to have one’s application for asylum examined on the merits as laid down in Articles 3(1) DR read in conjunction with 23(1) read in conjunction with 29(1) PD read in conjunction with 13 and 18 QD. This rule is subject to a considerable, yet limited number of exceptions for specific kinds of cases. As these exceptions are amenable to judicial review, they do not detract from the direct effect of the mentioned provisions. Thus, European asylum law confers a subjective right to asylum that can be enforced before the authorities of the Member States.

Application of the exceptions to this right - the exception of the safe third country, the exception of the subsequent application - is subject to conditions that likewise have a direct effect. In particular, provisions that explicitly leave

the Member States considerable discretion (Articles 27(2) and 35A(4) PD) make this discretion subject to conditions that may be relied on by the individual. Most of the safeguards on procedures that are relevant for observance of international law are fully or partially directly effective. As to provisions on secondary rights, those applying to refugee status beneficiaries are in general quite precise and unconditional, whereas those applying to subsidiary protection and applicant status beneficiaries usually leave a certain, but restricted amount of discretion.

9.2.3 Obligations during the transposition period

[660] All Community directives on asylum law granted the Member States a period for implementation (see number [62]). The obligation for the Member States to comply with the directive applies only after the expiry of that period.⁶¹ Before, the directive provisions do not yet have legal effect for asylum proceedings.

There are three exceptions. First, this may be different when a Member State adopted implementation legislation before the end of that term. The intention of that Member State to perform the obligation to transpose the Community measure (that appears from the (premature) legislation) triggers the obligation to read the implementation measure in accordance with Community law.⁶² Second, in the absence of such premature transposition, Community law does not prevent domestic courts from applying the principle of conciliatory interpretation voluntarily. Third, directives may require abstention from taking certain measures during the transposition period. In *Inter-Environnement Wallonnie*, the Court of Justice stated that

“Although the Member States are not obliged to adopt those [implementation] measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 [old, now 10 TEC, HB] in conjunction with the third paragraph of Article 189 [old, now 249 TEC, HB] of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed”.⁶³

This obligation apparently is restricted to abstention – there is no obligation to adapt legislation in anticipation of the expiration term, much as that legislation may diverge from the directive. Further, merely endangering the result is not enough; the directive will have this special sort of direct effect only if the domestic rule “seriously” compromises the result.

Arguably, this obligation applies at any rate to Articles 35(2), 30A(2) and 35A(7) PD. The provisions allow for legislation that falls short of the standards that generally apply to border procedures, to the national designation of safe countries of origin, or that allows for expulsion to safe neighbouring third countries without previous examination of the claim, if that legislation was in force at the time of adoption of the Procedures Directive (cf. numbers [382], [452] and [533]). Introduction of domestic standards that lower the level of protection below the level that generally applies according to the Procedures Directive during the implementation period would be at odds with these clauses. Arguably, a difference with *Inter-Environnement Wallonie* is that these clauses prohibit all legislation that lowers the standards in the mentioned respects, not merely legislation that is “liable seriously to compromise the result prescribed”.

[662] Finally, before the expiration of the transposition term, directive provisions that address the interpretation of international law may have legal effect within the domestic legal systems as means of interpretation of international law. We saw in paragraph 1.4.2.1 that state practice informs the interpretation of international treaty law. Technically speaking, the directives on asylum are acts of the Council, not acts of the Member States in their capacity as states party to the Refugee Convention or other relevant treaties. But when the Member States ratified the Treaty of Amsterdam (Article 63 TEC), they empowered the Council to adopt rules on the interpretation of Article 1 RC that would bind them when they apply the Refugee Convention, i.e. when they act in their capacity as states party to the Refugee Convention. Therefore, the Qualification Directive provisions on the interpretation of the refugee definition may safely be qualified as an expression of the Member States’ (not only the Council’s) minimum interpretation of Article 1 RC.

Further, the directives that address international law should alternatively be accepted as means of interpretation of international law because they are “relevant rules of international law” for the purposes of Article 31 VTC. We saw in paragraph 1.5.2 that Community law cannot and may not be classified as “international law” as regards its legal effects within the European Union. But from the external perspective of international law, the Treaty on European Community and acts based on this Treaty are “international law”. For the Member States in their capacity as states party to the Refugee Convention, thus when the Member States adopt this external perspective, the Qualification Directive and other secondary Community law on the interpretation of international law therefore qualify as relevant international law.

9.2.4 Concluding remarks

[663] Domestic courts must “as far as possible” interpret domestic law in accordance with Community law (“indirect effect” or “conciliatory interpretation”). All provisions of Community law, including those that lack direct effect, may be given such indirect effect. Meanwhile, there are limits to the obligation to give indirect effect to Community law. First, the constitutional position of the judiciary under domestic law may prohibit extensive interpretation of domestic law. Second, general principles of Community law may resist conciliatory interpretation, in particular, the principles of legal certainty and non-retroactivity. For European asylum law, these restraints are relevant for obligations of applicants during the asylum procedures and for conditions on the grant of secondary rights, but not for rules on qualification.

Further, domestic courts can apply provisions that have “direct effect”. Provisions have direct effect when they are unconditional and sufficiently clear. In cases where provisions leave Member States discretion but also set limits to it, observance of those limits is subject to judicial review. A considerable number of provisions of European asylum law have direct effect or set limits that are subject to judicial review (see paragraph 9.2.2).

Does Community law establish an order of precedence between these two ways of giving effect to Community law? According to Prinssen, the case law of the Court of Justice does not show an unambiguous preference for either way.⁶⁴ Most commentators appear to hold the view that indirect effect is preferable, because of its conciliatory effect and because it suits better the principle of subsidiarity, whereas both methods are in principle equally capable of securing the full effect of Community law within the domestic legal order.⁶⁵ Only where the limits to conciliatory interpretation come into play (set by the position of the judiciary and the principle of legal certainty), is giving direct effect the preferable or even only viable way.⁶⁶

In principle, directives can be relied on only after the expiry of their period for transposition (or after a transposition measure was adopted, if this happened before the end of that term). But during this period, Member States may not take measures that “seriously compromise” the result envisaged with the directive, and they have to comply with the standstill clauses. Moreover, during this period directives that address the interpretation of international treaty law have legal effect outside the realm of Community law: as means of interpretation of the Member States’ obligations under international law.

9.3 Adjudication of asylum law by the Court of Justice

Acts by Community institutions as well as acts by Member States (acting as the executive branch of the Community) must be in accordance with international asylum law (cf. paragraph 2.2.2.3). The review of this compliance rests ultimately with the Court of Justice, through the preliminary rulings procedure (see paragraph 9.3.1).⁶⁷ This review may concern the validity of secondary Community law because of conflicts with superior Community law, in particular, with superior rules that require accordance with international law on asylum (discussed in paragraph 9.3.2). This review by the Court of Justice further addresses the interpretation of primary and secondary Community law on asylum. In Chapters 5 to 8, a number of important issues as regards interpretation and application of international asylum law were identified. In paragraph 9.3.3 I will discuss whether these issues fall within the scope of review of the Court of Justice. Subsequently, I will address the question of which national courts are competent to refer preliminary questions (paragraph 9.3.4), and in what types of cases they have an obligation to ask questions (paragraph 9.3.5).

9.3.1 Preliminary rulings

[664] Whereas it is up to the domestic courts of the Member States to ensure the legal protection of individuals that Community law entitles them to, the unity of Community law is guaranteed by the supervision of the Luxembourg courts. According to Article 68 read in conjunction with 234 TEC, domestic courts facing questions on Community law pursuant to Title IV TEC can refer the question to the Court of Justice for a preliminary ruling. The ruling of the Luxembourg court on the issue is “preliminary”, as it does not decide on the case itself. The Court will only answer the question of Community law, and the referring court applies the Community rule to the case, guided by the preliminary ruling on the matter.⁶⁸

Article 234 TEC regulates the preliminary rulings procedure as it generally applies; Article 68 TEC introduces a number of particularities in references to the Court of Justice for matters concerning Title IV TEC. Two issues in particular are relevant for European asylum law. First, the scope of national courts that can refer questions to the Court of Justice is restricted in comparison to the general regime established by Article 234 TEC (see further paragraph 9.3.4). Second, Article 68(3) introduces an advisory procedure that does not apply to other Titles of the Treaty: Member States, the Council and the

Commission can ask the Court to give a ruling on the interpretation of Title IV and of measures based on it. So far, no such ruling has been requested. In other respects, the usual regime established by Article 234 TEC applies.

[665] Under the regime of Article 234 (read in conjunction with Article 68(1)) TEC, references to the Luxembourg courts for preliminary rulings can be made on three types of subject-matter: interpretation of the Treaty on European Community, the interpretation of acts of Community institutions, and the validity of such acts.⁶⁹ In all three types of cases, the Court of Justice can be asked to rule on issues relevant for international asylum law.

For the first type of issue, Article 63(1) and the second last clause of Article 63 TEC set international asylum law as a direct standard for measures pursuant to Article 63(1), (3) and (4), as well as for domestic law within their scope (number [146]). After the entry into force of the Constitution, the Charter will rank as primary law (number [166]).

Secondly, domestic courts may refer questions on the interpretation of acts of Community institutions, such as regulations and directives. Questions under this heading may concern the content of provisions of Community asylum legislation, and the scope of that legislation.

Thirdly, a question may concern the validity of acts of Community institutions. This possibility for domestic courts to submit the validity of Community legislation for review to the Luxembourg Courts is the counterpart to the possibility to challenge the validity of decisions under Article 230 TEC (see number [637]). One of the grounds for appeal under Article 230 TEC, which is also relevant for action under Article 234 TEC,⁷⁰ is “infringement of the Treaty or of any rule of law relating to its application”.

9.3.2 Review of validity of Community legislation on asylum

Minimum standards and accordance with international law

[666] The review of validity of acts of the Community institutions (directives, regulations, or the lists of safe third neighbouring countries or safe third countries of origin) addresses (*inter alia*) “infringement of the Treaty or of any ruling relating to its application”. That includes review of accordance with the Refugee Convention and other relevant treaties (Article 63(1) TEC; or of compliance with relevant general principles of Community law – see number [118] above). In chapters 5 to 8, we concluded that several provisions are not up to the standards set by relevant international law: they prescribe treatment of

applicants or other CEAS status beneficiaries that falls short of, or deviates from treatment prescribed by international law. Should we conclude that these rules are therefore invalid?

Most rules of secondary law on asylum are minimum standards (see number [256]). Minimum standards should allow the Member States to adopt or maintain domestic law that deviates in favour of the applicant. If the Community standards do so, no conflict with international law can occur. For instance, Article 10(1) RSD requires that applicants, including (unrecognised) Convention refugees, must have access to schooling under “similar” conditions as nationals. This standard falls short of Article 22(1) RC that requires the same treatment as nationals (see number [608]). But Article 4 RSD explicitly allows Member States to adopt or maintain a “more favourable” standard, thus to give applicants the same treatment as nationals in terms of access to schooling. Therefore, we cannot conclude that this standard is at variance with international law.

[667] It follows that insofar as European asylum law provisions state “minimum standards”, they cannot be invalid because of lack of accordance with international asylum law. The question of validity can come up only for provisions that do not state minimum standards (see number [224]). Thus, a provision of Community law that sets a standard that falls short of international law, and moreover precludes Member States from adopting a more favourable one (that would be in accordance with international law) would not be in accordance with international law and therefore invalid.

The precise grounds for invalidity depends on the legal basis of the relevant provision. The rules on qualification, procedures and secondary rights must be minimum standards according to Article 63(1), (2) and (3)(a) TEC. A provision on that subject matter that does not set a minimum standard is invalid because of infringement of the Treaty requirement that it should set a minimum standard. But the question of whether or not it does set a minimum standard depends on the question of whether or not it allows the Member States to adopt more favourable rules that are in accordance with international law standards. Hence, the validity of such a provision is affected by the requirement of accordance with international law in an indirect way. Rules on allocation of applicants based on Article 63(1)(a) TEC (the Dublin Regulation and related instruments) do not have to set minimum standards (number [215]). A rule on that subject matter may nevertheless set a minimum standard (when it allows Member States to adopt more favourable standards); then, it cannot be invalid because of lack of accordance with international law. But if

it does not set a minimum standard, and requires Member State conduct at variance with international law, it would be invalid because of breach of Article 63(1) first clause TEC.

In summary, the question of which provisions of the Community legislation on asylum are invalid because of lack of accordance with international law depends, directly or indirectly, on the question of which provisions do not state minimum standards. Below, I will discuss the provisions of European asylum law that in their wording seem not to state minimum standards. It will appear that some indeed do not, whereas others, despite their wording, allow for more favourable domestic standards. As to the rules that do not state minimum standards, I will subsequently address the question of whether they impose a rule that prohibits the Member States from performing their obligations under international law. For if a Community “maximum standard” does not address international law, or prohibits standards that international law also prohibits, it is in accordance with international law.

Obligatory cessation of and exclusion from protection statuses

[668] A few provisions on qualification seem not to state minimum norms: those that require cessation or exclusion. Article 11 QD states grounds when a person “ceases to be a refugee” (which are based on Article 1C RC, see number [346]), and Article 12 QD when a person “is excluded from being a refugee” (based on Article 1D, 1E and 1F RC, see numbers [344] and [337]). Cessation and exclusion are hence obligatory. We should observe that these provisions exclude the relevant categories of persons not only from the scope of Article 13 QD, from Directive refugee status, but from “being a refugee”. It seems that the provisions state an obligation to exclude aliens also from the grant of refugee status according to standards in domestic law, that exceed the minimum standards set by the Qualification Directive. Could these provisions nevertheless be interpreted as if they allowed for more favourable domestic standards, and were hence in accordance with their minimum standard character?

[669] According to Articles 1D, 1E and 1F RC, the Refugee Convention “shall not apply to” persons within their scope, who are therefore not “refugees” in the sense of this instrument. In other words, refusal or withdrawal of refugee status to or from these persons is a declaratory act (cf. paragraph 8.2.3). If a Member State decides not to apply, say, Article 1D and “recognises” Palestinians who qualify under Article 1A(2) RC, but to whom the Refugee Convention does not apply according to Article 1D RC, that State does so in

excess of its obligations under the Convention, in fact on discretionary grounds.⁷¹ Such domestic legislation falls outside the scope of the Qualification Directive, and is therefore not affected by Article 12(1)(a) QD.⁷² The same reasoning applies to Article 12(1)(b) and (2) QD (concerning Articles 1E and 1F RC).⁷³

Their validity would be affected however, if the Qualification Directive did set rules on the interpretation of Articles 1D to 1F RC that were overly wide. If the Directive stated rules on exclusion or cessation that apply also to persons who fall outside the scope of Article 1D, 1E or 1F RC (and qualify for refugee status under Article 1A(2) RC), Article 12 QD would require exclusion of persons who do qualify as a refugee under Article 1 RC. The discussion of Article 12 QD however did not reveal such overly wide clauses.

As to Article 11 QD, the matter is different. Article 1C RC arguably suggests that aliens continue to be “refugees” in the sense of the Convention until their status (the recognition of their refugee status) has been withdrawn; put otherwise, withdrawal or cessation of refugee status on the basis of Article 1C is a constitutivist, not a declaratory act. Obligatory cessation of refugee status would therefore be at variance with the minimum norm character of Article 11 QD. However, despite the wording of Article 11 QD, cessation is not obligatory. For according to Article 36 PD, the Member States “may”, not must, start withdrawal procedures in case they have reasons to reconsider the validity of the refugee status (see number [468]).

In summary, both Articles 11 and 12 QD do not affect the competence of the Member States to adopt or maintain more favourable domestic standards that are in accordance with their obligations under international law.

[670] Articles 16 and 17 QD state, in obligatory terms, cessation and exclusion from subsidiary protection for certain categories of aliens (number [339] and [346]). These categories include persons who fall within the scope of Article 3 ECHR, 7 CCPR or 3 CAT. Are Articles 16 and 17 QD therefore rules that prohibit the Member States from offering protection in accordance with their obligations under the prohibitions of *refoulement*, and therefore invalid?

Obligatory exclusion from subsidiary protection status does not imply an obligation to expel. European asylum law simply does not address what should happen to persons who are excluded from those statuses. Hence, the obligation to exclude persons from subsidiary protection status does not infringe on the prohibitions of *refoulement*. Incidentally, Articles 16 and 17 QD do not prohibit the Member States from grant persons excluded from subsidiary protection (or whose status has ceased) a status on discretionary grounds.

Obligatory denial of examination

[671] As to the rules on procedures, two arrangements seem to impose obligations that are detrimental to the applicant's procedural rights. First, Articles 19(2) and 20(1)(e) DR seem to prohibit domestic law that attaches suspensive effect to appeal against the decision not to examine a claim for protection on grounds laid down in the Dublin Regulation (cf. number [425]). It was observed that such a reading would run counter to the subsidiarity principle. Moreover, we should bear in mind that these regulation provisions are, as all rules on procedures for the granting of protection, minimum standards (cf. number [187]). A rule of domestic law stating that appeal against any negative decision on a request for asylum has suspensive effect would be in favour of the applicant. And such a rule could not undermine the coherence of Community law: Article 38(3)(b) PD explicitly allows for this rule (cf. number [425]). Hence, Article 19(2) and 20(1) DR read in their context do allow for domestic legislation attaching suspensive affect to appeals against refusal of asylum because another Member State has accepted its responsibility.

[672] Second, according to Article 30B(2) PD, Member States must issue a negative decision on an application by a national from a safe third country of origin figuring on the "minimum common list" if the applicant has not rebutted the presumption of safety (cf. number [446]). Is this rule a minimum standard? We observed that the Member States are free to set standards for rebuttal in accordance with their international legal obligations (number [459]). We further saw that in cases where the presumption of safety is not justified, the Member States can request removal of the concerned country from the list; this request suspends the obligation to consider that country as 'safe' for the purposes of Article 30B PD (number [459]). In so far, it is possible to read the provision as a minimum standard in the sense that it allows for domestic standards that deviate from the Procedures Directive in favour of the applicant. But one may hold that this arrangement is not a minimum standard, as offering some difficult escape route is not the same as allowing for more favourable standards (cf. number [460]). And it is unclear whether a Member State can continue to request removal of a country from the list (and so suspend the obligation to consider it as safe) if the Council has, on a previous request, decided not to remove it. One could state that subsequent requests for removal undermine the coherence of European asylum law, and are therefore not allowed for (see number [257]). Therefore, there are good reasons to state that the safe third country exception as laid down in Articles 30 and 30B PD do not set a minimum standard.

Whether these doubts on the validity of these provisions will indeed lead to legal problems depends on the states that occur on the “minimum common list”. As far as the arrangement does no more than require that the good human rights record of, say, Canada be taken into account when applications by Canadian nationals are examined, there is little chance of collision with international law.

Obligatory denial of secondary rights

[673] Article 11(1) RSD requires that “Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market” (cf. number [609]). This rule requires denial of access to the labour market during a period to be determined by the Member States. Therefore, it is not a minimum standard and in principle invalid.

But the rule is not at variance with international law. Relevant provisions in this respect are Articles 17 and 18 RC that require access to the labour market for “lawfully staying refugees”, i.e. refugees who are lawfully present for more than three months (number [550]; as observed in paragraph 8.7.1, applicants must be treated in accordance with those provisions). And Article 11(1) RSD does not prohibit the Member States from granting access after three months of lawful presence. Denial of access to the labour market after three months would therefore affect the validity of the domestic measure, denial before that period cannot be challenged on the basis of international law.

[674] Further, a number of provisions “allow” Member States to grant certain benefits, or to grant them to certain categories of beneficiaries. For example, Article 14(2) RSD states that Member States “may allow” adults access to the education system, and Article 12 TPD even states that Member States shall authorise access to the labour market “for a period not exceeding that of temporary protection”, thus implying a limit to granting such access.⁷⁴ Read *a contrario*, the Member States “may” not grant other benefits nor grant them to other categories of beneficiaries. If read so, these rules prohibit the grant of certain secondary rights.

But arguably, it follows from Article 63 TEC that we should not read these provisions as if they conferred a competence to grant certain benefits. All rules on secondary rights are based on Article 63(1)(b) or (3)(a) TEC and are, therefore, “minimum standards”. Not only does the “minimum” character call for an interpretation that allows Member States to exceed those standards, the qualification as “standards” implies that the relevant rules of Community law address the exercise of competencies that the Member States already had

before the adoption of the relevant directives. Thus, rules that “allow” Member States to grant certain secondary rights do not confer a competence to do so.

What other legal meaning could they have? Arguably, they serve to inspire Member States to grant those benefits, in excess of the minimum standards they must observe. Handoll suggests that provisions that “allow” Member States to grant secondary rights serve the purpose of ensuring that granting those benefits can not be considered as encouraging secondary movements, and thus not as countering the aim of the Directive.⁷⁵

Concluding remarks

[675] Only rules that prohibit Member States from setting standards that are more favourable for persons in need of protection, i.e. rules that do not set minimum standards, could be invalid for lack of accordance with international asylum law. Most rules on qualification, procedures and secondary rights are minimum standards, or appear to set minimum standards. An exception is Article 11(1) RSD, on denial of access to the labour market for applicants. But the rule does not prohibit Member States from complying with relevant international asylum law. Possibly, another exception is the obligatory assumption of unfoundedness of applications by persons from safe countries of origin ex Article 30B PD. Here, the “maximum standard” nature may lead to collision with international law standards, but whether it will do so in practice depends on the ‘safety’ of the countries that occur on the list.

9.3.3 Review of Member State acts

Introduction

[676] According to Article 234 read in conjunction with 68 TEC, domestic courts can ask preliminary questions on the interpretation of the Treaty. This includes questions on the requirement of accordance with the Refugee Convention and other relevant treaty law (see paragraphs 2.2.2.1 and 2.3). Thus, the Court of Justice is competent to rule on the interpretation of international asylum law. But the scope of review by the Court of Justice is limited: it is restricted to acts that fall within the scope of Community law (number [136]). Thus, not each and every Member State act in the realm of asylum is open to review by the Luxembourg Court, only acts that implement or apply directives and regulations on asylum. Therefore, the Court of Justice’s competence to interpret international asylum law is restricted to subject matter that falls within the scope of the Community legislation on asylum.

In order to properly assess the role of the Court of Justice as interpreter of international asylum law, we should distinguish between three kinds of situation. First, European asylum law states in clear terms a rule that is in accordance with international asylum law. In this situation, there is no need to ask the Court of Justice to rule on the interpretation of international asylum law. For example, Article 27 QD requires that refugee status beneficiaries have “full access” to primary education “under the same conditions as nationals”. As far as recognised refugees are concerned, this standard secures full compliance with the relevant standard in the Refugee Convention, Article 22(1) (see number [577]). The Member States must comply with Article 27 QD, and where they do, they also comply with Article 22(1) RC (as far as Directive refugees are concerned). And if some measure of domestic law does not comply with Article 27 QD, it is sufficient to establish so – the interpretation of Article 22 RC is not needed.

Second, a provision of Community law states in clear terms a rule that is at variance with international asylum law. For example, Article 7 QD states that “parties or organisations, including international organisation” can offer protection from persecution or serious harm. For the purposes of Article 1 RC, neither parties nor organisations can offer protection (number [316]). As the matter is explicitly addressed, it falls within the scope of Community law: a rule of domestic law that designates parties or organisations as actors of protection implements Article 7 QD. A domestic court that is faced with a rejection of an application on these grounds can therefore turn to the Court of Justice for a ruling on the accordance of this measure with international asylum law.

Third, an issue of international asylum is not explicitly addressed in Community law at all, or addressed in an unclear manner. For example, Article 9(3) QD (as well as Article 10(2) QD) states that a person has a well-founded fear of persecution only if there is a connection between the act of persecution and a Convention ground (number [330]). It would follow that a person does not qualify as a Directive refugee if only a link between the absence of protection from persecution and the Convention ground can be established. But this link would be sufficient to qualify as a refugee pursuant to Article 1 RC. In this, Article 9(3) QD would not be up to the standards of international law. Could the Court of Justice be approached to rule on the matter?

In this situation, the scope of the provision must be assessed in order to decide whether it addresses the “causal nexus” as such. If so, the link between protection and Convention ground falls within its scope, and can be ruled on by the Court of Justice. But it may also turn out that Article 9(3) QD address-

ses only the causal nexus between persecution acts and Convention grounds, and leaves other instances of the nexus to domestic law. Then, the matter falls outside the scope of Community law and hence outside the scope of review of the Court of Justice.

[677] How to delimit this scope? In paragraph 2.2.2.3, we saw that, apart from the text of the contested rule, the degree of harmonisation that the measure seeks to establish is a most relevant factor. If a measure is designed to establish only an initial or modest degree of harmonisation, matters that are not addressed fall outside its scope (number [115]). As all Directives on asylum set “minimum standards”, it is by no means self-evident that they address their object (qualification for protection, asylum procedures and so on) in a comprehensive way. Thus, as a minimum standard, Article 9 QD may leave aspects of the causal nexus that it does not explicitly addresses to domestic law. However, minimum standards are not necessarily intended to establish a low level of harmonisation (number [214]). What level of harmonisation is aimed at must be assessed for each instrument separately. Further, the context of a provision may call for an extensive interpretation. Thus, although Article 9(3) QD does not explicitly say so, interpretation of the provision in its context reveals that it does address the topic of causal nexus comprehensively (see number [680]).

In Chapters 5 to 8, a number of provisions whose compatibility with international asylum law raises some issue were identified. Below, I will address the most pertinent issues concerning qualification, procedures, the third country exception and secondary rights, focusing on secondary Community law that is unclear (the third kind of situation mentioned above).

Qualification

[678] As far as rules on qualification for refugee and subsidiary protection status are concerned, we may observe that, in general, the Qualification Directive sets minimum standards, which calls for a restrictive interpretation of its scope (see number [115]). However, the instrument is intended to establish “common criteria for the identification of persons genuinely in need of international protection”.⁷⁶ It follows from the term “common” that a considerable, though not comprehensive degree of harmonisation is aimed at (see paragraph 4.6).

The scope of international law on qualification for protection addressed by the instrument is limited to a considerable extent by Articles 13 and 18 QD. For the *definitions* of “refugees” and “persons eligible for subsidiary protection” in Articles 2(c) and (e) QD quite comprehensively reproduce Article 1

RC and the personal scope of persons entitled to protection from *refoulement* are based on Article 3 ECHR.⁷⁷ But it does not follow that each question on qualification for protection under these instruments of international law falls within the scope of the Directive, as it establishes obligations for the Member States for a far smaller group of persons. The Qualification Directive requires the issue of a residence permit and so on only⁷⁸ for “beneficiaries of refugee (and subsidiary protection) status” (see numbers [576] and [596]). According to Articles 13 and 18 QD, these statuses must be granted only to persons who qualify as a refugee (as meant in Article 2(c) QD) *in accordance with Chapter II and III* (or to persons eligible for subsidiary protection as meant in Article 2(e) QD, in accordance with Chapters II and IV). The instrument therefore does not state obligations to persons who qualify as a refugee (or who are eligible for subsidiary protection) in accordance with *other* rules than those set out in Chapters II-IV. Those other rules hence fall outside the scope of the Qualification Directive, and (unless addressed by other European legislation) outside the scope of Community law.

A number of issues, relevant for qualification as a refugee or as a person in need of protection pursuant to Articles 1 RC or Article 3 ECHR (or Articles 3 CAT or 7 CCPR) are not addressed at all in Chapters II, III and IV of the Qualification Directive. The standard of proof implied by the “well-founded fear” criterion, and “humanitarian cases” within the ambit of the prohibition of *refoulement* ex Article 3 ECHR provide examples. Hence, if a Member State refuses a residence permit or is willing to expel a person whose expulsion is prohibited by Article 3 ECHR on “humanitarian grounds” (cf. number [297]), the accordance of these acts with international law cannot be reviewed by the Court of Justice. For as protection of “humanitarian” cases is not addressed in Chapters II or IV, the applicant falls also outside the scope of “subsidiary protection”, and (no other Directive being relevant) outside the scope of Community law. The standard of proof implied by well-founded fear would have been amenable for review by the Court of Justice if the Qualification Directive had stated a standard, as its Proposal did (see number [278]). In the absence of such a provision, the matter is left to domestic law.

[679] A number of issues are addressed in Chapters II to IV, but not comprehensively, not in accordance with international asylum law, or in an unclear manner. In some cases, the text of the provision clearly indicates that it does not intend to provide a comprehensive arrangement. For example, Article 10(1) QD, on “Reasons for persecution” (the Convention grounds), numbers

“elements” that Member States “shall take into account when assessing the reasons for persecution” (cf. number [325]). Arguably, it follows from this wording that aspects of the Convention grounds that are not mentioned in the list fall outside the scope of the provision, and hence outside the scope of review by the Court of Justice.

In other cases, the text of provisions on qualification is unclear about their scope. Thus, Article 6 QD leaves some uncertainty on the question of whether or not third parties may count as actors of persecution or serious harm if there is neither a state nor a *de facto* authority (number [313]). The phrase “actors of persecution or serious harm shall *include*” in Article 6 QD (emphasis added) may serve as an indication that the provision is not meant to settle the issue of actors of harm completely. However, the heading to the provision (“Acts of persecution and serious harm”) as well as the Preamble recital that explicitly states that “[i]n particular, it is necessary to introduce common concepts of [...] sources of harm and protection” suggest otherwise.⁷⁹ Object and purpose of Article 6, hence indicate that the issue was not left to the Member States. The Court of Justice can, therefore, be approached for clarification of the scope of Article 6(c) QD.

The same reasoning applies to the contradictory rules on protection needs arising *sur place* (see number [335]). Article 5(2) QD suggests that the fear of persecution or risk of harm should be due to convictions held in the country of origin. Article 4(3)(d) (and Article 20) QD on the other hand suggest that fear or risk could also be based on activities that the applicant engaged in after departure from the country of origin, which is in accordance with international law. As Article 5 QD, according to its heading, addresses the issue of “international protection needs arising *sur place*”, and as the Preamble states that it is “in particular [...] necessary to introduce common concepts of” this matter,⁸⁰ the issue was not left to domestic legislation.

The flawed arrangement on “internal protection” in Article 8 QD can be subjected to the same interpretation. As this provision is headed “Internal protection”, and as the Preamble states that “[i]n particular, it is necessary to introduce common concepts of [...] internal protection”,⁸¹ it is apparently intended to address “internal protection” comprehensively.

[680] Finally, the causal nexus between the act of persecution and a Convention ground, required for qualification as a refugee by Article 9(3) and 10(2) QD (cf. numbers [330]-[333]), is somewhat intricate. Does a domestic rule on the nexus between failure of protection and a Convention ground fall within or outside the scope of the Directive? The headings to Articles 9 and 10

QD read “acts of persecution” and “reasons of persecution”. They do not, therefore, suggest that the provisions are intended to address the causal nexus in a comprehensive way (in contrast to the headings to Articles 5 and 6 QD). Nor does the Preamble state that it is necessary to address this matter “in particular”. All this suggests that other aspects of the causal nexus than the one addressed by Articles 9(3) and 10(2) QD fall outside the scope of Community law, and are left to domestic law.

The text of Article 9(3) QD, however, strongly suggests otherwise where it states that the requirement of a connection between the Convention ground and the persecution act is “in accordance with Article 2(c)”, that is with the refugee definition. We may safely assume that according to the Qualification Directive legislator, all provisions on qualification in Chapters II and III are “in accordance with Article 2(c)”, at least in the sense that they are not at variance with it, but no other provision explicitly states this to be the case. Arguably, the explicit reference to the refugee definition in Article 9(3) QD serves to make clear that the requirement of a link between a persecution act and a Convention ground is implied by the refugee definition itself, or, put another way, the proper meaning of the term “for reasons of”.⁸² This textual argument, backed up by the objective to set “common standards” on qualification, arguably defeats the *a contrario* reasoning set out above. Hence, Article 9(3) QD addresses the causal nexus as such, and the Court of Justice is competent to rule on the matter.

Procedures

[681] The material scope of the Procedures Directive is not clear, as the instrument gives two general indications that contradict each other. On the one hand, the instrument sets minimum standards, and aims at no more than establishing a “minimum framework” for procedures.⁸³ It would follow that issues that are not explicitly addressed by the instrument fall outside the scope of Community law. On this basis one could argue that where the Directive allows for exceptions to the right to a personal interview (cf. number [399]), the matter falls outside the scope of Community law, regardless of the compatibility with international law of those exceptions. On the other hand, the Procedures Directive sets general standards on asylum procedures that may imply a wider scope. Thus, decision making in most procedures in the first instance should be “individual, objective and impartial” (Articles 3A(1), 7(2) PD), and “complete and adequate” (Article 23(2) QD); the remedy offered in appeal must be “effective” (Article 38(1) PD). Could we assume that the restrictions to individual access to procedures (cf. number [394]) fall within the scope of

Community law, as they affect the individual, objective, impartial, complete and/or adequate nature of the decision-making?

For the rules on organisation that apply to procedures at first instance, this ambiguity is partially solved by the context and object and purpose of the relevant provisions. The Preamble states that “the organisation of the processing of applications for asylum is left to the discretion of Member States”.⁸⁴ Aspects of the organisation of procedures not addressed by the Directive, such as the time frame for decision-making, therefore fall outside the scope of Community law. The Preamble further holds that

“every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to co-operate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case at and throughout all stages of the procedure”.⁸⁵

Thus, the rules on procedural safeguards serve to secure “effective access” and to provide for “sufficient procedural guarantees” – but these are “subject to certain exceptions”. Bearing in mind that the Directive provides merely for a “minimum framework”, it seems that those “exceptions” fall outside the scope of the instrument.

[682] For appeal procedures, the scope of review by the Court of Justice is considerably broader than the material scope of the various provisions on appeal (Articles 38 PD, 19 and 20 DR and 28 TPD), due to the working of the general principle of Community law that everyone whose rights under Community law are affected is entitled to an effective remedy (number [421]). As this principle is informed by relevant international law, notably by Article 13 ECHR, it entails that the appeal authority may suspend expulsion in case of an arguable claim, and that they may address matters of fact in addition to matters of law. Secondary law cannot influence the scope or content of this hierarchically superior principle of Community law. The preamble to the Procedures Directive acknowledges that Article 38(1) does not confer, but rather confirms this right to an effective remedy.⁸⁶

It follows that domestic law on suspensive effect and on the scope of judicial review falls within the scope of Community law. This conclusion is not at odds with Article 38(3)(a) and (b) PD: this provision only leaves the modalities for organising the right to remain during appeal proceedings to domestic law. For practical purposes, it leaves them the choice between providing that an appeal has suspensive effect, or that such effect may be requested.

[683] The Procedures Directive stipulates that applications by nationals from third countries that are designated as “safe countries of origin” by the Council are rejected, unless the applicant manages to rebut the assumption of safety (Articles 30 read in conjunction with 30B PD; see par. 6.4.5). We saw that application of this presumption of safety is in accordance with international law only if it does not result in a heightened standard of proof of the applicant’s fear of being persecuted (or risk of serious harm), and that the standard suggested in Article 30B(1) PD, “serious grounds”, is quite unclear in this respect (number [456]). Could the Court of Justice rule on a question concerning a domestic law provision that, relying on the term “serious” in the English language version, raises the standard of proof for the applicant beyond the level that usually applies to refugees or subsidiary protection beneficiaries? As the standard is explicitly addressed in Article 30B(1) PD, the Court of Justice can indeed rule on it (the second type of case addressed in the introduction, see number [676]).

A similar issue arises over the standard that applies to subsequent applications addressed in the ‘preliminary procedure’. Pursuant to Article 33(4) PD, a subsequent application can be considered as unfounded if there are no new facts that “significantly add to the likelihood of” qualification for refugee or subsidiary protection status (cf. number [438]). Again, as this standard is explicitly stated, the Court of Justice can test domestic law that applies it to the Refugee convention and other relevant treaty law.

The third country exception

[684] The rules on application of the safe third country exception laid down in Articles 27 and 35A PD address the requirements of international law on rebuttal of the assumption of safety only partially. Article 27(2) PD states that

“[t]he application of the safe third country concept shall be subject to rules laid down in national legislation, including: [...] (c) rules, in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.”

Hence, it is not explicitly required that domestic law allows for rebuttal of the presumption that the third country is safe for the purposes of Article 33 RC. Could the Court of Justice rule on domestic law that does not allow rebuttal on this ground? Article 27(2)(c) PD explicitly states that the domestic rules on rebuttal must be “in accordance with international law”. Does it follow that this term was intended to bring these rules of national law within the scope of

Community law? The term “as a minimum” suggests otherwise, and so does the set-up of the provision: instead of providing for rules on the rebuttal, it explicitly leaves the matter to domestic legislation, stating a minimum standard only where expulsion contrary to Articles 3 ECHR, 3 CAT and 7 CCPR is concerned.

Even more explicitly, Article 35A(4) PD leaves it to domestic law to provide for exceptions from the application of the ‘safe neighbouring third country procedure’ “for reasons of public international law” (see number [534]). Arguably, a Member State that applies the exception without providing these exceptions would contravene the Directive, but the Court of Justice would not be competent to rule on the particular “reasons of public international law” that should be addressed in the national rule.

[685] The Dublin Regulation is based on the presumption that the Member States are safe third countries, and does not state grounds for rebuttal of this presumption (number [522]). Article 3(2) DR allows Member States where an application is lodged to examine the claim for protection on its merits, although another Member State is safe. Member States may make use of this competence in case the responsible Member State is unsafe for the purposes of the safe third country exception – and they should do so in order to act in accordance with the refugee Convention and other relevant treaties. Does domestic law on the application of the competence ex Article 3(2) DR (or the absence of such domestic law) fall within the scope of Community law? Arguably, it does not. Article 3(2) DR does not *confer* the right to examine requests for protection to Member States; rather, it confirms this sovereign right. For the right to grant asylum or to examine requests for it has not been transferred to the Community (only competence to set standards on the exercise of this right, i.e. competence to abridge it was transferred). Accordingly, Article 3(2) DR does not bring the matter within the scope of Community law. Nor do other rules of European asylum law set standards for the assessment of the safety of the Member States, so in marked contrast to the other safe third country arrangements. Hence, the matter is left to domestic law, and not amenable to review by the Court of Justice.

Secondary rights

[686] The Directives on Qualification and Reception Standards set minimum standards and aim at establishing a minimum level of secondary rights (see number [260]). The harmonisation ambitions are therefore modest. The Temporary Protection Directive also sets minimum standards; its Preamble does not further define the level of harmonisation.

Refugee, applicant and temporary protection beneficiaries are, under international law, entitled to a number of Convention benefits that are not addressed in the Directives on Qualification, Reception Standards and Temporary Protection (see number [625]). Bearing in mind the modest harmonisation ambitions in this field, the benefits that are not addressed arguably fall outside the scope of Community law.

[687] Finally, we should address the Family Reunification Directive. Its Preamble states that refugees merit “special attention” “on account of the reasons that obliged them to flee their country of origin and prevent them from leading a normal family life there”, and are therefore entitled to “more favourable conditions [...] for their right to family reunification”.⁸⁷ Articles 10 to 12 FRD, indeed, state such more favourable standards. From the perspective of international law, the arrangement shows two major flaws (cf. number [587]). To begin with, Article 9(2) FRD allows Member States to restrict the more favourable treatment to family ties that predate the flight, whereas the fear for persecution also provides for a major obstacle to lead family life in the refugee’s country of origin if the family ties were engaged in after the flight. Further, Article 12(1) third clause FRD allows Member States to require that the refugee applying for family reunification can provide for “normal” accommodation, sickness insurance and stable income for the reunited family, if the application was lodged over three months after the refugee was granted his status. Could the Court of Justice rule on the compatibility with Article 8 ECHR of a national rule that implements both grounds for rejection?

Arguably, it follows from the quoted Preamble recital that the arrangement on refugees merely serves to state “more favourable conditions” than usually apply to applicants for reunification, not to address the refugee’s claims under Article 8 ECHR comprehensively. Types of cases for which the Directive does not state more favourable conditions hence fall outside the scope of its minimum standards.

Conclusions

[688] The Court of Justice is competent to interpret international asylum law, but its review is restricted to Member State acts that fall within the scope of Community law. Aspects of international asylum law fall within this scope if they are explicitly addressed by a rule of secondary Community law. Some provisions of Community law set clear standards that are compatible with (or even exceed) the standards of international law. In such cases, there is no need for the Court of Justice to address the interpretation of international law. Compliance with these provisions of secondary Community law entails com-

pliance with international law. This applies to a number of secondary rights for Directive refugees (such as Article 27 QD).

Other provisions of Community law explicitly set clear standards too, but standards that are not compatible with international asylum law. Examples are the rules on actors of protection and on internal protection, laid down in Articles 7 and 8 QD. The Court of Justice is competent to rule on the accordance of these rules with international law.

Again, other provisions of secondary Community law also explicitly address some aspect of international asylum law, but do so only partially or in an unclear manner. Here, the scope of the rule of Community law must be interpreted on the basis of its context and purpose. In some cases, it follows that such provisions serve to address the relevant aspect of international law comprehensively. Accordingly, issues that are not explicitly addressed by the text of the provision also fall within the scope of Community law, and thus within the scope of review of the Court of Justice. This applies to the rules on refugees *sur place*, actors of harm, the causal nexus, suspensive effect of appeal, and the standards for rebuttal that may apply to subsequent applications and the exception of the safe country of origin (Articles 5, 6, 9(3) and 10(2) QD, 38, 33(4) and 30B(1) PD).

In other cases, however, it follows from context and purpose that the relevant rule of Community law is intended to address the subject matter only partially. Then, aspects of that subject matter that are not explicitly addressed fall outside the scope of the rule of Community law, and therefore outside the scope of review by the Court of Justice. Examples are the rules on the Convention grounds, exceptions to procedural safeguards, aspects of the standards for rebuttal of the safe third country exceptions, and exceptions to the more favourable treatment of applications for family reunification by refugees (Articles 10(2) QD, 27(2) and 35A(4) PD, 3(2) DR and 9(2) and 12(1) FRD).

Finally, some aspects of international asylum law are not addressed at all by secondary Community law. Obviously, they fall outside the scope of Community law. Examples are rules on “humanitarian” cases under Article 3 ECHR, the standard of proof implied by “well-founded fear”, and numerous Refugee Convention benefits.

9.3.4 The implications of Article 68 TEC

9.3.4.1 Introduction

[689] In the previous paragraph, we saw that the Court of Justice is competent

to issue rulings on a considerable part of international law, but that it will be able to do so only when domestic courts refer questions to it. Which courts are competent to refer? It is in this respect that Article 68(1) TEC derogates from Article 234 TEC. The Constitution for Europe does not contain a counterpart to Article 68 TEC. Hence, Article 369 CFE, the successor to Article 234 TEC, will apply to asylum issues as well.⁸⁸

Pursuant to Article 234 TEC, “any” court or tribunal “may” refer questions to the Court of Justice, “if it considers that a decision on the question is necessary to enable it to give judgement”. Courts “against whose decisions there is no judicial remedy under national law” *must* refer such questions. Hence, courts of first instance may, and upper courts must refer. Both enjoy power of “appraisal”, that is, they enjoy “discretion [...] to ascertain whether a decision on a question of Community law is necessary to enable them to give judgement”.⁸⁹

Article 68(1) states that where a question

“is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.”

Hence, “upper” courts “shall” refer questions on Title IV, when they consider it “necessary” – they have the duty to refer, and have power of appraisal, just as they do under Article 234 TEC.⁹⁰ But in contrast to Article 234 TEC, Article 68(1) denies courts of first instance the competence to refer questions on Title IV before the Court of Justice for preliminary ruling. Questions by lower courts on asylum issues will be declared inadmissible.⁹¹

The exclusion of courts of first instance in Article 68(1) was presumably prompted by the desire to protect the Luxembourg Courts from an overload of preliminary questions.⁹² We may observe that this exclusion could have adverse effects on the unity of Community law in the field of asylum, as it will take more time before questions on interpretation are referred to the Court than if courts of first instance had the competence to do so. Arguably, the exclusion also adversely affects the efficiency of asylum procedures, for as De Zwaan and Bultema observe, it provokes continuation of proceedings for the sole purpose of a reference to the Luxembourg courts.⁹³

However this adapted preliminary ruling proceeding may work out, we are concerned with the consequences for judicial protection of persons within the scope of international asylum law. In this respect, the lack of power of courts of first instance to refer questions raises two issues. Firstly, how does Article

68 TEC affect their powers in adjudicating compatibility with international asylum law? And secondly, which courts whose decisions are not subject to review under domestic law?

9.3.4.2 Courts of first instance and interpretation

[690] The competence of domestic courts of first instance to interpret Community law is not affected by their lack of power to refer to the Court of Justice. The only limitation Article 234 (read in conjunction with 68) TEC sets to their ability to adjudicate is the prohibition to declare Community measures invalid (see number [691]).

Hence, under the regime of Article 234 read in conjunction with 68 TEC courts of first instance can apply Community measures without turning to the Court of Justice for clarification, as long as they have no doubts on its validity. The lack of competence to refer to the Court of Justice therefore has no consequences for protection under international law if a case concerns only interpretation of the Treaty or interpretation of Community legislation. If a lower court deems a Member State act within the scope of Community law to be incompatible with international asylum law binding the Community and can solve the case by interpretation of the Treaty or the Community act in accordance with international asylum law, there is no problem.

9.3.4.3 Courts of first instance and invalid Community acts

[691] In paragraph 9.3.1, it was argued that only a few rules of the present body of European asylum law are invalid. This may be different for future European asylum law. Therefore, I will discuss the consequences of Article 68 TEC for courts of first instance that face questions on the validity of Community law on asylum.

If a lower domestic court has serious doubts on the validity of (present or future) Community legislation on asylum, it would find itself in a difficult position. Only the Court of Justice is competent to declare an act of a Community institution (such as a Directive) invalid.⁹⁴ Hence, when a court of first instance deems a Community measure invalid for violation of primary Community law, it must assume that the measure is valid and apply it. But when it does apply the measure, it violates the rule of primary Community law according to which the measure is invalid. Since Article 68(1) TEC bars refe-

reference to the Court for solving these conflicting obligations, how is this problem to be solved?

One solution would be the assumption that courts of first instance are competent to refer questions in the exceptional case of doubts on the validity of Community measures on asylum. But such a competence is at odds with Article 68(1) TEC, and the Court of Justice is unwilling to bridge gaps in the Community legal protection system by reading Treaty provisions *contra legem*.⁹⁵ It is also unlikely that the Court of Justice would depart from the reading that Article 234 TEC prohibits lower courts to declare Community measures invalid. The reasons for denying domestic courts the competence to declare Community legislation invalid apply to asylum legislation as fully as to any other kind of Community acts: uniform application of Community law and the Court being in the best position to decide on the validity of Community acts.⁹⁶

[692] I can think of three alternative solutions for this deadlock. The first solution endeavours to fit in with the Community system of judicial protection: extensive application of the rules for granting interim relief during preliminary ruling proceedings.

The Court of Justice ruled in *Atlanta* that a domestic court could suspend implementation of Community law, if four conditions are met:

- “- that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
- there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
- the national court takes due account of the Community interest; and
- in its assessment of all those conditions, the national court respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.”⁹⁷

The only condition that poses problems is the first one, reference to Court of Justice. This condition firmly links suspension of the Community measure to the actual reference to the Court of Justice, a condition that courts of first instance cannot meet as they cannot refer the matter themselves. The condition is obviously of crucial importance for securing the Court’s prerogative under Article 234 TEC to rule on the validity of Community measures and hence for the uniform application of Community law.

When considering this condition, we should bear in mind that the grant of

interim relief is based on the principle that every individual is entitled to effective protection of the rights Community law entitles him to (cf. number [631]). As Community law provides for assessment of validity of Community measures by the Court of Justice, irreparable harm during such assessment must be precluded by the grant of interim measures. Article 242 TEC explicitly empowers the Luxembourg courts to provide for interim relief in case of actions based on Article 230 TEC. As the Court pointed out in *Atlanta*, the “coherence of the system of interim legal protection therefore requires that national courts should also be able” to grant the same relief.⁹⁸ Thus, the Court applies competencies attributed to it by the Treaty for direct appeal proceedings (Articles 230 and 242 TEC) in a corresponding manner to the other branch of Community legal protection, notwithstanding the fact the grant of interim relief by a domestic court indisputably endangers uniform application of Community law, albeit temporarily.

I think that the same reasoning applies to the preliminary ruling proceedings as modified by Article 68(1) TEC. As we saw above, the masters of the Treaty presumably decided to limit access to the Luxembourg courts in this way in order to protect them from being overburdened, and not in order to downgrade effective protection. The Court of Justice can assess legislation pursuant to Title IV on its validity; hence, persons affected by that legislation are entitled to interim relief in accordance with the Community principle of effective protection. And according to the *Atlanta* conditions quoted above, the lower court can suspend the measure if questions on its validity have been referred to the Court of Justice.

Thus, in order to fill a gap in the Community judicial protection system, we have to assume that the court of first instance is competent to suspend allegedly invalid Community legislation. The link between the grant of interim measures by the court of first instance and the reference to a preliminary ruling is secured in asylum proceedings, albeit in an indirect way. For in asylum procedures, one of the parties is the determining authority or some other agency of the Member State, to whom Article 10 TEC applies (cf. number [56]). If a court of first instance suspends a Community measure, this agency has the duty under Article 10 TEC to make sure that this unlawful situation ends. The agency therefore has the obligation to appeal against the decision by the court of first instance to suspend implementation of the Community act until the case is brought before the court that is competent to refer the matter to the Court of Justice.

In this way, respect for primary Community law would be secured by the interim suspension, and the unity of Community law as well as the Court’s

exclusive power of assessing validity of Community acts would ultimately be respected too. This solution further fits in well with the system of effective judicial protection of Community law. Still, the link between the suspension and the reference to the Court is indirect, and hence somewhat weak. In other words, it secures judicial protection to the detriment of the unity of Community law.

[693] The second solution would be as follows: we would assume that the Community principle of effective judicial protection requires that domestic procedural law provide for a special remedy that applies in case a lower court has doubts on the validity of a Community measure on asylum. The rule of domestic law would entail that the lower court has the competence to refer, pending its decision on the appeal, the questions on the validity of the Community measure to the court whose decisions are not open to review. This court could either decide that there are no doubts about the validity of the Community measure; then, the court of first instance must apply the measure to the case before it. If the higher court shares the doubts on the validity, it refers the matter to the Court of Justice (and grants interim relief for the applicant, in accordance with the *Atlanta* conditions).

In this way, the direct link between the grant of interim relief and reference to the Court would be secured, but at the expense of the procedural autonomy of the Member States. Although the principle of effective judicial protection of Community rights may under certain circumstances imply an obligation to provide for remedies hitherto unknown under domestic procedural law (see number [636]), this solution may seem too radical.

[694] The third solution would circumvent the question of validity, by application of Article 307 TEC. We saw in paragraph 2.1 that domestic courts are competent to declare Community measures incompatible with international obligations resting on the Member States, and for that reason not apply the Community measure. Neither Article 234 nor 68(1) TEC affects this competence. These provisions address only the competence to judge on compatibility of Community measures with international asylum law binding the Community, not international law binding the Member States (though they are identical).

Obviously, a decision by the lower court not to apply the Community measure pursuant to Article 307 TEC would impair the uniform application of Community law. Again, appeal by the state, obligatory under Article 10 TEC, would bring the issue eventually to the upper court, which could refer the question of compatibility of the Community measure with international asylum law to the Court of Justice.

9.3.4.4 Courts whose decisions are not subject to review

[695] One final issue remains to be settled. Which courts cannot refer to the Luxembourg Courts? Article 68 TEC speaks of courts “against whose decisions there is no judicial remedy under national law”. This definition is identical to the one in the third paragraph of Article 234 TEC. Hence, the case law on Article 234 TEC applies.

There are two views on the matter. According to the “abstract theory”, only such courts whose decisions are never subject to review are courts in the sense of Article 234(3). According to the “concrete” theory, the applicable criterion is whether the involved decision is open to review. The Court of Justice has not yet ruled on the issue. But according to many commentators, the Court’s decision in *Costa v E.N.E.L.* offers grounds to assume it adheres to the “concrete” theory.⁹⁹ For in that case, the Court qualified the referring Italian court as a court whose decisions are not subject to review, although the decisions of this court were open to appeal in other types of cases. The concrete theory is more attractive for the purposes of Article 68 as it renders more courts competent to pose preliminary questions on asylum law and therefore reduces the number of cases wherein the problems addressed in the previous paragraph could arise.

9.3.4.5 Conclusions

[696] Pursuant to Article 68 TEC, only courts whose decisions are not subject to review under domestic law can refer preliminary questions. The inability of lower courts to state preliminary questions does not affect their competence to interpret European asylum. But the arrangement raises problems in cases where lower courts consider a piece of Community legislation invalid, as a domestic court can suspend its application only while referring the matter to the Court of Justice. Several solutions for this deadlock were suggested (see numbers [691]-[694]). A court whose decisions are in general open to review under domestic law may nevertheless refer questions if they arise in a case that is not open to further domestic review.

9.3.5 Exceptions to the obligation to refer

[697] In paragraph 9.3.3, a number of issues concerning international asylum law that falls within the scope of Community law were identified. On these

issues, the Court of Justice can rule. Article 234 read in conjunction with Article 68 provides that where a question of interpretation is raised before a court whose decisions are not open to review under national law, that court *must* bring the matter before the Court of Justice (cf. par. 9.3.1). But will these courts actually do so? The obligation to refer is subject to three exceptions that may be relevant for the number of cases on asylum that will be brought before the Court of Justice.¹⁰⁰

To begin with, the obligation does not apply when the Court of Justice has already interpreted the Community provision involved (the “*acte éclairée*” doctrine).¹⁰¹ As yet, the Court has not ruled on any provision of European asylum law.

Second, the domestic court has no obligation to refer a question that is raised before it

“if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case”.¹⁰²

If domestic law exceeds the level of protection prescribed by a minimum standard of European asylum law, then there is in principle no need to state a preliminary question. For regardless of the accord of the rule of European asylum law with international asylum law, the domestic court would apply the domestic rule.

[698] The accord of the rule of European asylum law with international law would be relevant in a case where domestic law does not prescribe a higher level of protection: the correct interpretation of the rule of Community law might then be decisive for the outcome of the case. If the interpretation is disputed, the domestic court must refer questions on the contested rule of Community law to the Court of Justice, unless it is confident that the answer is clear (that it is an “*acte clair*”). The domestic court may consider so only if “the correct application of Community law [is] so obvious as to leave no room for any reasonable doubt”.¹⁰³ Before the domestic court comes to the conclusion that there is no room for such doubt, it “must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice”, compare “the different language versions” of the provision and, if these are “entirely in accord with each other”, it should be borne in mind that “Community law uses terminology that is peculiar to it”, its own “legal concepts”;

“Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.¹⁰⁴

Arguably, on many of the issues discussed in paragraph 9.3.3, there is sufficient room for “any reasonable doubt” to trigger the obligation to refer questions in case they are relevant for the outcome of domestic proceedings. This is all the more true in cases where the interpretation of the relevant rules of international asylum law varies among Member States.

Yet domestic courts whose rulings are not subject to review under the domestic legal system may not be readily inclined to refer questions concerning accordance with international asylum law. Hitherto, these courts were the supreme authorities on the interpretation and application within their Member States of the Refugee convention, the Convention Against Torture and the Covenant on Civil and Political Rights. Hence, on many issues addressed by European asylum law they (may) have already established an interpretation in accordance with international law. If the rule of European asylum law reflects or even exceeds the previously applying standard, there will not be much room for doubt. The fact that the domestic law of other Member States prescribes some higher level of protection is not necessarily due to a diverging reading of obligations under the relevant instruments of international asylum law. Rather, the courts that can refer may see those diverging standards as domestic ones that exceed the obligations under international law, which are allowed for by the minimum standards of European asylum law, but outside the scope of the latter. And the special regard that must be had to the concepts and other features that are particular to Community law may not be that persuasive as regards the concepts applied in, say, the Refugee Convention. Arguably, domestic courts may be more readily inclined to state preliminary questions on interpretation issues they have not yet addressed.

9.3.6 Conclusions

[699] The Court of Justice is competent to rule on the validity of secondary Community law, and on the interpretation of primary and secondary Community law on asylum (see further par. 9.3.1). European minimum standards on asylum can be invalid because of conflicts with international asylum law only if they prohibit Member States from adopting or maintaining domestic law that exceeds Community law to the advantage of the alien (see paragraph 9.3.2). Arguably, only Article 30B PD may do so under certain specific circumstances. The Court of Justice’s competence to rule on the interpretation of international asylum law on the other hand is quite considerable (see paragraph 9.3.3).

Whether or not the Court of Justice will have much opportunity to address interpretation of international asylum law remains to be seen, for two reasons. First, courts whose decisions are subject to review under national law cannot pose preliminary questions (at least not on issues of interpretation; see further par. 9.3.4.2). Second, the courts that can refer questions may see no reason to do so if domestic law prescribes standards of treatment that exceed those in European law. In states where Community rules reflect or exceed the reading of those standards of international law in domestic law, courts may not be inclined to decide that there is room for sufficient doubt on the reading of European law to refer questions to the Court of Justice (see paragraph 9.3.5).

9.4 The Luxembourg Courts and domestic courts

Introduction

[700] Insofar as domestic courts form part of the Community judiciary, they must comply with rulings by the Court of Justice, including those on interpretation of international asylum law. However, we saw in Chapter 2.1 that the Member States' obligations under the instruments of international asylum law remain unaffected by Community law on the same subject matter. In their capacity as courts of States party to the relevant instruments of international law, the domestic courts of the Member States can and must secure observance of those instruments. What are the consequences of the competence of the Court of Justice to interpret international asylum law for domestic courts in the latter capacity?

Obviously, there is no competition between domestic courts and the Court of Justice where the latter is not competent. This holds true not only if an act falls outside the scope of Community law, but also when it comes to the validity of the Treaty. This issue will be discussed briefly below. More important for the present study are other acts within the scope of Community law, which fall within the scope of the Court's jurisdiction. The consequences that domestic courts may or must attach to rulings by the Court of Justice for their own testing against international asylum law will be discussed below.

Accordance of the Treaty on European Community with international law

[701] Notably absent from the scope of the jurisdiction of the Court of Justice is the validity of the Treaty or other provisions ranking as primary Community law.¹⁰⁵ Therefore, the Luxembourg organs cannot rule upon the compatibility of provisions of the Treaty with international asylum law.¹⁰⁶ Consequently, the

competence of the domestic courts of the Member States to rule on the validity of primary Community law is not affected.¹⁰⁷

Could the compatibility of primary Community law with international asylum law be questioned with any chance of success? Doubts have been cast on the Spanish Protocol on the grant of asylum to Community citizens. But its Sole Article may be read and applied in a manner consistent with international asylum law (see number [462]).

Hailbronner mentions the differentiation between refugee status addressed in Article 63(1), and temporary protection in Article 63(2)(a) TEC.¹⁰⁸ We saw in Chapter 8.2 that the granting of temporary protection status upon a request for recognition as a refugee does in itself not infringement on the Refugee Convention (cf. number [620]).¹⁰⁹ The differentiation is therefore not incompatible with international asylum law. The same reasoning applies *mutatis mutandis* to differentiation between standards for the reception of “applicants” and residence conditions of “refugees”.¹¹⁰

Accordance of Member State acts with international asylum law

[702] Preliminary rulings by the Court of Justice may address the compatibility of domestic law with international asylum law. Could the Court’s interpretation of international asylum law conflict with interpretation by domestic courts? Two situations should be distinguished. Firstly, interpretations of international asylum law by the Court of Justice that exceed, and secondly, interpretations that fall short of readings by domestic courts.

In the first situation, the Court of Justice imposes on the Member State an obligation towards persons who invoke international asylum law, in excess of that Member States’ obligations under the relevant instrument of international law (as interpreted by that Member State). Here, a conflict is not possible for obviously, such a ruling by the Court of Justice has no adverse effect upon the protection under international asylum law. One could of course argue that such an interpretation infringes on the Member State’s sovereignty. For example, if pursuant to a preliminary ruling on the Qualification Directive a Member State must recognise an alien as a refugee, although he does not fulfil the requirements of Article 1 RC according to that Member State’s own reading of the Refugee Convention, the sovereign right of that state to control the presence of aliens is infringed upon. However, there is no conflict in the proper sense on the interpretation of the Refugee Convention, as the latter instrument does not prohibit a broader scope of application than the refugee definition requires (see number [223]). The “infringement” would rather be due to an (allegedly) erroneous reading of the scope of Community

competence by the Court. Under Article 63(1)(c), the Community is competent only on the qualification of refugees as meant in the Refugee Convention, not to grant refugee protection to persons outside the scope of the Convention, so one might argue.

[703] Conflicts may occur in the second situation, when rulings by the Court of Justice prescribe treatment that falls short of the standard set by international law. In general, conflicts are unlikely under present European asylum law, as most of it leaves Member States the competence to grant protection in excess to its standards. Let us assume for example that the Court of Justice is asked a preliminary question on the accordance of Article 9(3) QD with the Refugee Convention, and that it rules that it follows from Article 1 RC that a person with a well-founded fear of persecution cannot qualify for refugee status if a causal nexus between the persecution act and a Convention ground is absent (cf. number [680]). This reading would not render the true meaning of Article 1 RC. But as Article 9(3) RC sets a minimum standard, the provision (as interpreted by the Court of Justice) does not affect the domestic court's competence to give a more favourable ruling. A domestic court would hence be free to rule that a person may also qualify for refugee status if a connection between the absence of protection and a Convention ground has been established.

Still, in such circumstances the ruling by the Court of Justice might have a detrimental effect on the protection of Refugee Convention rights. A domestic court confronted with this issue may very well be tempted to rely on the interpretation by the Court of Justice. Then, the domestic court would be neglecting the fact that obligations under international law that rest on the Member State (in their capacity as States party to the Refugee Convention), remain unaffected by European asylum law. Put otherwise, the domestic courts must establish the true meaning of the Refugee Convention autonomously from the interpretation of this instrument by the Court of Justice.

[704] The matter is different when the Community law obligation is not a minimum standard, and the Court of Justice upholds it. We saw that Article 30B PD may impose an obligation to act contrary to international asylum law, and future asylum legislation might bind the Member States to take negative decisions on requests for asylum (number [672]). If the Court of Justice ruled that this obligation is in accordance with international law whereas a domestic court assumed otherwise, that domestic court would indeed face conflicting obligations. We saw in Chapter 2.1 that according to Article 307 TEC, Community law cedes precedence to international law in case of a conflict.

However, it is questionable whether Article 307 applies to Community acts based on Article 63(1) TEC.

In *Lévy*, the Court of Justice ruled that the obligation to apply Community law is suspended only if a conflicting rule of national law is “necessary” to ensure the Member State performs its obligations under the anterior international agreement, and that it is up to the domestic court to decide which obligations that agreement imposes on that state.¹¹¹ Hins commented that Article 307 TEC does not apply in case of a conflict with the European Convention of Human Rights. He argued that the Luxembourg Courts test Community law to the European Convention of Human Rights, and if they conclude that the rule of Community law does not conflict with the Convention, Article 307 TEC cannot apply.¹¹² Lawson and Besselink argue that the Court of Justice does not “apply” the Convention in the proper sense, but rather tests Community law to general principles of Community law that are inspired by them; hence, it neither will nor can conclude that Community law does not conflict with the European Convention of Human Rights.¹¹³

This reasoning is most convincing as far as general principles inspired by European Convention provisions are concerned. But does it also apply to the direct test against international asylum law pursuant to Article 63(1) TEC? Testing whether a rule of Community law is “in accordance with” a rule of relevant international law very much amounts to “application” (cf. number [132]).

It would follow that Article 307 TEC never applies to Community law based on Article 63(1) TEC. Article 63(1) TEC states that all Community law based on it must be in accordance with international treaty law. If a rule of Community law is “in accordance with” international treaty law, a conflicting rule of national law cannot be “necessary” (in the terms of *Lévy*) to ensure the Member State’s performance under the Refugee Convention. Then, there is no justification for the Member States suspending their obligations under Community law as required by Article 307 TEC. And if a rule of Community law is *not* in accordance with international law, it is invalid. Then, Member States have no need to invoke Article 307 TEC.

If all this is true, Community law based on Article 63(1) TEC that requires negative decisions on applications could lead to treaty conflicts that are insoluble under international treaty law (see par. 2.1.5). For Member States could then face an obligation under Community law to issue a negative decision, and an obligation under international law to take a positive one, and Article 307 TEC would not apply. It follows from Article 30(4)(b) read in conjunction with (5) of the Vienna Treaty Convention that the Member States are then responsible both under Community law and under international law.

Conclusions

[705] Rulings by the Court of Justice on the interpretation of international asylum law can in theory conflict with the reading of those obligations by domestic courts. Under present European asylum law, such conflicts are unlikely. Conflicts do not occur when rulings by the Court of Justice prescribe treatment that exceeds the standards set by international law, and rulings that require denial of protection are unlikely, as those rulings address minimum standards.

If, nevertheless, European asylum law based on Article 63(1) TEC leads to conflicts, Article 307 TEC may not serve as a means for solving them. If rules of European asylum law that deny protection are “in accordance with” international asylum law, international law is not “affected” by European law. If the domestic court holds that such rules of Community law are in breach of international law, it faces a conflict for which international treaty law offers no solution.

For the present, however, it is most unlikely that rulings by the Court of Justice would adversely affect the legal position of applicants and other status beneficiaries under international asylum law. Adverse effects on that legal position may rather be due to unwillingness of domestic courts to address the compatibility of rules of European asylum law with international law, once the Court of Justice has ruled on it. In this respect, the possibility of appeal to the European Court of Human Rights and other treaty monitoring bodies may serve to emphasize the obligation of the Member States to assess the scope and content of their obligations under international law, autonomously from any obligations under European asylum law.

9.5 Strasbourg review of European asylum law

The Court of Justice is competent to rule on the “accordance” of Member State acts with international asylum law. Could this judicial competence have consequences for the individual’s access to the monitoring bodies that are attached to the instruments of international law? The consequences of overlap between the scopes of jurisdiction of the Court of Justice and of the European Court of Human Rights have been addressed in the case law of both courts. As far as I know, neither the Committee against Torture nor the Human Rights Committee ever addressed the issue. The discussion below therefore focuses on the European Court of Human Rights.

For present purposes, we can distinguish three types of cases that will be discussed below. First, acts by Member State authorities executing Community law that leaves them (some) discretion. Second, such acts based

on Community law that leaves no discretion. And third, acts by Community organs where no executive Member State act is involved.

9.5.1 Review of Member State acts based on Community law that leaves discretion

[706] The European Court of Human Rights does review Member State acts that are based on Community law that leaves (some) discretion. This follows from *Cantoni v France*.¹¹⁴ Cantoni had been convicted for violating a provision of domestic law that was allegedly too imprecise, and therefore in breach of Article 7 ECHR. The relevant provision of French law was based on a provision of a Community Directive. The French government had pointed out that the “finding that the [domestic law provision] was defective would amount to making the same finding in respect of [the Directive provision].”¹¹⁵ But this circumstance had no consequences for the review by the European Court of Human Rights. It observed that

“[t]he fact, pointed to by the Government, that [the domestic law provision] is based almost word for word on Community Directive 65/65 [...] does not remove it from the ambit of Article 7 of the Convention”,¹¹⁶

and decided on the matter without any further allusion to the Directive.

The European Court of Human Rights confirmed this view in the Grand Chamber judgement *Bosphorus*, where it ruled “that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations”; hence, there will be “review by this Court of the exercise of State discretion for which EC law provided.”¹¹⁷

All present European asylum law leaves the Member States a certain amount of discretion when implementing or applying it. It follows from the above that Member States are “fully responsible” for any implementation or application of such law; therefore, complaints of violations of Articles 3 or 13 ECHR due to Member State acts that implement or apply European asylum law are (other conditions fulfilled) subject to full judicial scrutiny by the European Court of Human Rights.

9.5.2 Member State acts based on Community law that leaves no discretion

[707] The matter may be different when it comes to Member State acts that

apply Community law that leaves no discretion. As we saw in paragraph 2.1.6, it follows from *Bosphorus* that the question of whether an interference with (in any case) Article 1 ECHR Prot 1 is justified is not subject to full scrutiny the legal basis for the interference is an obligation under Community law that leaves the Member State no discretion, and the Community legal order provides for protection that is “equivalent” to that under the Convention. Arguably, the *Bosphorus* approach could very well apply to Article 13 ECHR cases, even though the text of the provision does not state that interferences may be justified. Although Article 6(1) ECHR does not contain a limitation clause, it appears from the Court’s case law that interferences with the right to a fair trial may nevertheless be justified if they serve a legitimate aim and are proportionate to it,¹¹⁸ and the same approach could apply to Article 13 ECHR. But it is unclear how this approach should be applied to cases under Article 3 ECHR, as this provision, according to well-established case law, does not allow for “justification” of interferences (cf. number [98c]). In the discussion of the implications of the notion of “equivalent protection” and its application in *Bosphorus* below, I will for brevity’s sake speak of interferences with Convention rights in general.

[708] It appears from *Bosphorus* that fundamental rights protection must satisfy two requirements in order to be “equivalent”, that is, “comparable” to Convention protection (cf. number [98b]). First, “substantive guarantees” must be provided: fundamental rights, as those set out in the Convention must apply as standards. The European Court of Human Rights is satisfied that fundamental rights protection in the Community legal order meets this requirement. In this context it refers to Article 6(1) TEU and the standing case law of the Court of Justice on fundamental rights, as well as to the Charter and even to the Constitution for Europe.¹¹⁹ Second, there must be “mechanisms of control in place to ensure observance of such rights” if the protection is to be “equivalent”. In this context, the European Court of Human Rights observes that “access to the [European Court of Justice] is limited”, but identifies two circumstances that make up for that limitation. First, “actions initiated before the ECJ by the Community institutions or a Member State constitute important control of compliance with Community norms to the indirect benefit of individuals”.¹²⁰ Second, “it is essentially through the national courts that the Community system provides a remedy to individuals against a Member State or another individual for a breach of EC law”, and “the ECJ maintains its control on the application by national courts of EC law, including its fundamental rights guarantees, through the procedure” of Article 234 TEC.¹²¹ In this con-

text “[i]t is further recalled that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees”.¹²² Consequently, “the Court finds that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, “equivalent” [...] to that of the Convention system”.¹²³

In summary, the assumption that the Community legal order provides for “equivalent protection” applies in general; therefore, Member State acts implementing Community law that leaves no discretion are presumed to be in accordance with the European Convention of Human Rights.

[709] Do the criteria discussed above establish the “equivalence” of Community protection of fundamental rights in a meaningful kind of way? In the first requirement, the presence of substantive guarantees, it may be observed that the Charter and the Constitution do not provide for any legal guarantee at all as they are not (yet) binding. But as argued in paragraph 2.2.2, the general principles of Community law provide for standards for observance of fundamental rights that are indeed compatible to those set out in the European convention of Human Rights.

As to the second criterion, the European Court of Human Rights in fact states that the review by domestic courts combined with supervision by the European Court of Justice amounts to a control mechanism that is “equivalent” or “comparable” to the Convention observance system. Observance of the rights and freedoms laid down in the European Convention falls primarily to domestic courts (or otherwise independent authorities as meant in Article 13 ECHR), and subsidiarily to the Strasbourg Court (see number [413]). So the reasoning of the European Court of Human Rights amounts to stating that the supervision by the European Court of Justice is “comparable” to its own supervision. Four objections can be made to this statement.

Firstly, individuals can appeal themselves to the European Court of Human Rights. In contrast, direct appeal by individuals to the European Court of Justice is quite limited. Appeal by Member States or Community institutions or references for preliminary questions by domestic courts may “constitute important control of compliance with Community norms” by the Court of Justice, but these devices do not secure the possibility of asking for redress in individual cases.

Secondly, the nature of preliminary rulings is quite different from the nature of the European Court of Human Rights’ own judgements. In *Bosphorus* the Strasbourg Court acknowledges that “the ECJ’s role is limited to responding to the interpretative or validity question referred by the domes-

tic court”, but it continues to observe that, “the response will often be determinative of the domestic proceedings”.¹²⁴ Indeed they “often” do, that is, not always. Moreover, it is left to the domestic court to apply the rule as illuminated or formulated by the Court of Justice to the case – whereas the European Court of Human Rights will apply the rule itself. In the case of direct appeals to the European Court of Justice, another objection applies. In such cases, the Community judiciary is itself the primary instance of observance – that is, in such cases no supervision by an external court takes place.

Thirdly, as Lawson has observed,¹²⁵ the nature of the equivalent protection test is flawed. This is an abstract test – does the Court of Justice *generally* afford equivalent protection in a particular type of cases? If so, the state is not responsible for examining accordance with the European Convention of Human Rights unless the manifest deficiency test is satisfied. The oddity of this reasoning becomes manifest when one applies it to states party to the Convention. Should we presume that expulsion allegedly resulting in torture should be considered to be in accordance with Article 3 ECHR because domestic law states “substantive guarantees” against expulsion and the individual can rely on those guarantees before domestic courts?

Fourthly and finally, the Strasbourg Court is specialized in human rights cases, whereas the Luxembourg Court is not. If faith is put in the quality of supervision of observance of human rights, it is unclear why the Luxembourg Court deserves more credit than, for example, the far more specialised Constitutional Court of Germany.

It should be noted that none of these objections address the quality of the fundamental rights protection by the Community legal order in general or by the Court of Justice in particular. As stated above, in my view the Court of Justice’s testing against fundamental rights is most satisfactory. But as far as protection of Convention rights in individual cases is concerned, its position is simply not on a par with the European Court of Human Rights’ own position.

[710] The presumption that the Community system of protection of fundamental rights is equivalent to that under the Convention is rebutted if, in the circumstances of the particular case, the Community fundamental rights protection was “manifestly deficient”. The Court does not state in the abstract when the “manifest deficiency” criterion is satisfied, but addresses three circumstances. First, “the nature of the interference”; second, “the general interest pursued by the impoundment and the sanctions regime” (i.e. the ending the war in former Yugoslavia) and third, “the ruling of the ECJ (in the light of the

opinion of the AG)".¹²⁶ This last consideration refers to a preliminary question stated by the Irish Supreme Court in the domestic proceedings by *Bosphorus* against the impoundment of its aircraft. In its preliminary ruling, the Court of Justice had addressed *inter alia* the question of whether or not application of the regulation (the impoundment) was compatible with Article 1 of Protocol 1 ECHR in a somewhat succinct kind of way; the Advocate-General on the other hand had addressed the matter quite extensively. – On the basis of these three considerations, the European court of Human Rights “considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights”.

As to these considerations, the question comes up of whether they apply cumulatively or not. In particular, would the outcome have been the same if no preliminary question had been put to the Court of Justice? If not, the implication of the judgement would be that only if the European Court of Justice has already addressed the compatibility of the application of a measure with the European Convention, would the presumption that application is in accordance with that Convention apply. The European Court of Human Rights has not stated this, however.

Furthermore, the reference to the opinion of the Advocate-General for the preliminary ruling raises questions. If the Court of Justice’s ruling did not make “clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights”,¹²⁷ there is no reason why the Opinion could change that, as the Opinion does not bear legal consequences for the Member State whose court referred the question. If the Court of Justice’s ruling was, however, satisfactory, it is unclear what the reference to the Opinion does purport.

[711] One may argue that the appraisal above does not do justice to the *Bosphorus* judgement for three reasons. First, one may state that the above objections ignore the fact that the European Court of Human Rights endeavours to establish a balance between the interests of co-operation within the Community legal order and protection of Convention rights. This may be true, but it should be observed that the balance attained is to the detriment of the protection an individual may derive from the European Convention – it remains, hence, questionable whether the balance is fair. Second, one may state that the approach set out in *Bosphorus* serves to prevent procedures from going on quasi-indefinitely – appeal proceedings in Strasbourg after preliminary proceedings do indeed considerably stretch the length of time during which the legality of the act of state remains uncertain. But as observed above, it does not follow from *Bosphorus* that the presumption of equivalent protec-

tion applies only if a preliminary procedure has taken place. Third, the judgement may be explained by the wish to decrease (or rather, temper the increase) of the Strasbourg Court's caseload. But this consideration could not justify the disadvantageous treatment of, in particular, acts pursuant to Community law that leave the Member States no discretion.

9.5.3 Review of acts by Community institutions

[712] As yet, Community institutions lack the competence to take decisions on individual cases, but this might change under future Union law. Therefore, I will briefly address the standing of persons in need of protection before the European Court of Human Rights in cases where such decisions are not compatible with the European Convention of Human Rights. This situation is different from that addressed in the previous paragraphs because in there is no Member State "in between" the Community act and its execution. Thus, no particular Member State can be addressed as the executive agent.

Complaints against institutions of the Community are not admissible before the European Court of Human Rights, as the Community is not a party to the Convention.¹²⁸ The only available alternative route to bring complaints of breaches of the Convention before the Court is holding Member States responsible for those Community acts. No such complaint has as yet been brought before the Court. They have been brought before the Commission, who dismissed them, applying the equivalent protection doctrine.¹²⁹ Since *Bosphorus*, it is not unlikely that the European Court of Human Rights will apply this approach. But does it follow that it will hold Member States responsible for acts that are committed by Community organs, even if those Member States are not involved in this act at all?

Arguably, the European Court of Human Rights implicitly answered the question by asserting that despite the transfer of powers to the Community, the Member States retained liability (although their responsibility is only "partial"; cf. numbers [98]-[98a]). If the Treaty on European Community enables a Community institution to commit acts contrary to the European Convention of Human Rights, the Member States are liable under the Convention by having transferred that power to the Community. The transfer of power to the Community establishes (at least partial) responsibility under the European Convention. It follows that all States party to this instrument are equally responsible for the violation, as the ground for liability is the act of transfer of power, which they all committed. So paradoxically, transfer of power to take

decisions in individual cases to the Community would not diminish, but extend the individual's possibilities for getting access to the European Court of Human Rights. The same reasoning applies *mutatis mutandis* to other instruments of international asylum law.

[713] Hailbronner observes that the European Court of Human Rights can review Community legislation that infringes rights laid down in the European Convention of Human Rights.¹³⁰ This follows from the judgement *Ireland v UK*, wherein the European Court of Human Rights observed that “from the mere existence of law which introduces, directs or authorises measures incompatible with the rights and freedoms safeguarded” a “breach” could result. Such a “breach” occurs

“only if the law challenged [...] is couched in terms sufficiently clear and precise to make the breach immediately apparent; otherwise the decision of the Convention institutions must be arrived at by reference to the manner in which the respondent state interprets and applies *in concreto* the impugned text or texts.”¹³¹

Hailbronner argues convincingly that both regulations and directives can meet this test for review. *Locus standi* in this type of case is not reserved for states: in *Dudgeon v United Kingdom*, the Court ruled that the existence of legislation on homosexuality (though not yet applied to Dudgeon) was an “interference” on Article 8 ECHR.¹³²

Could European legislation on asylum successfully be challenged before the European Court of Human Rights? This is unlikely. Most European asylum legislation that addresses Article 3 or 13 ECHR sets minimum standards that allows the Member States to apply more lenient standards (cf. number [257]). Such legislation cannot impose obligations in terms “sufficiently clear and precise to make the breach immediately apparent”. A possible exception is the “maximum standard” set by Article 30 read in conjunction with 30B PD, the obligation to apply the safe country of origin exception (see number [672]). But it appears that Member States can suspend its application, which renders a breach of Article 3 ECHR far from immediately apparent. Another possible exception would be the Dublin Regulation, as it does not necessarily set minimum standards. But Article 3(2) DR allows the Member States to examine each appeal that is lodged with them against Article 3 ECHR. Observation of Article 13 ECHR is made possible by Articles 19 and 20 DR, which require review of a negative decision on such an appeal which can, moreover, suspend the expulsion order.

Moreover, all European legislation on asylum must be interpreted and

applied in accordance with the European Convention of Human Rights, or with general principles of Community law reflecting its provisions. Consequently, European asylum legislation cannot violate the European Convention of Human Rights.

9.5.4 Assessment

[714] Present European asylum law leaves decision making to the Member States, and leaves them (a certain amount of) discretion for its implementation and application. It follows from settled case law by the European Court of Human Rights that Community law that leaves some discretion in no way affects the access of individuals to the European Court of Human Rights. In case of (hypothetical) future legislation on asylum that would leave the Member States that apply it no discretion, Member States are not responsible unless the human rights protection provided within the Community legal order turned out to be, in the particular circumstances of the case, “manifestly deficient”. If, under (even more hypothetical) future European law, Community institutions take decisions on applications, those institutions could not be held responsible for violation of Articles 3 or 13 ECHR (as long as the Community (or the Union) does not accede to the European Convention of Human Rights). But then, all Member States would be liable for a breach, on the basis of their transfer of this power to the Community. Complaints of breaches of Article 3 or 13 ECHR by current European legislation on asylum, finally, would not be successful, if only because this legislation leaves too much discretion for its application to make a breach sufficiently evident.

9.6 Conclusions

[715] In this Chapter I have discussed the system and scope of judicial supervision under Community law, as far as it is relevant for interpretation and application of international law. Conclusions on the several topics addressed were drawn in the concluding paragraphs, which are summarised below.

Community law requires that effective judicial protection in accordance with Articles 6 and 13 ECHR is available if rights under European asylum law are affected (paragraph 9.1.1). Therefore, effective remedies must be available even where not stated in secondary European asylum law. This is relevant for,

in particular, the denial of subsidiary protection status and denial of the derivative statuses of family members of European asylum status beneficiaries.

Domestic courts must give indirect effect to all European asylum law, that is, interpret domestic law in accordance with it. The obligation to do so is limited by, *inter alia*, the principle of legal certainty. But these are of little relevance where rules on interpretation or application of international asylum law are concerned (paragraph 9.2.1). A considerable number of provisions of European asylum law have direct effect, or set limits to the exercise of discretion by domestic authorities that are amenable to judicial review (paragraph 9.2.2).

Secondary Community law can be invalid because of a lack of accordance with international asylum law only if it does not state minimum standards. The only standard that raises serious doubts in this respect is the safe country of origin exception laid down in Article 30 read in conjunction with 30B PD (see number [672]). Only the Court of Justice can declare secondary Community legislation invalid. Direct appeal to it by individuals is not possible (number [635]), but domestic courts can ask questions on the validity in the preliminary rulings procedure.

The Court of Justice's review of international asylum law is restricted to issues that fall within the scope of secondary Community law. The discussion of some relevant rules of European asylum law showed that many parts of international asylum law fall within the scope of review of the Court of Justice (see paragraph 9.3.3). But restraints on the competence to refer and on the obligation to refer questions on interpretation of Community law to the Court may result in a modest number of preliminary rulings on issues of international asylum law (paragraph 9.3.4). The lack of competence of courts whose decisions are not open to review under domestic law does not affect their competence to interpret European asylum law, but raises some difficulties as to allegedly invalid Community legislation (see number [690]).

If the Court of Justice ever ruled that Article 30B PD or some other (future) European asylum law provision that imposes an obligation to take negative decisions on applications for asylum is in accordance with international law, domestic courts may face an insoluble conflict between European and international asylum law. If the relevant rule is based on Article 63(1) TEC, Article 307 TEC cannot serve as a solution for the conflict (number [704]). But for practical purposes, outright conflicts between European asylum law and international asylum law are, for the present, unlikely. Rather, European asylum law may have adverse effects on the legal position of aliens in another way. Domestic authorities may be unwilling to address the proper sense and meaning of international law and mistake the minimum standards of European

asylum law for it (number [703]). Therefore, the treaty monitoring bodies, and especially the European Court of Human Rights, will remain important for the assessment of scope and content of the Member States' obligations under international law.

Member State acts based on Community law that leaves them (some) discretion are amenable to review by the European court of Human Rights on the same footing as acts based on 'purely' domestic law. Member State acts based on Community law that leaves no discretion are however presumed to be in accordance with the European Convention, as the Community legal order is presumed to offer protection of fundamental rights that is equivalent to protection under the Convention. This presumption is however open to rebuttal, in case of 'manifest dysfunction' of the Community's fundamental rights protection.

NOTES

- ¹ ECJ 25 July 2002, C-50/00, [2002] *ECR*, p. I-06677 (*Unión de Pequeños Agricultores v. Council*), par. 39.
- ² *Ibid.* The nexus of these principles to Article 6 ECHR was discussed in paragraph 6.3.1.
- ³ They cannot challenge decisions by Community organs before domestic courts, for according to Article 240, jurisdiction by domestic courts is excluded on disputes conferred to the Court.
- ⁴ ECJ 23 April 1986, C-294/83, [1986] *ECR*, p. 01339 (*Parti écologiste "Les Verts" v. European Parliament*), par 23, reaffirmed in *Unión de Pequeños Agricultores v. Council*, par. 40.
- ⁵ Other grounds for invalidity, such as incorrect adoption (in the case of the present legislation on asylum: failure to consult the European Parliament) are not addressed.
- ⁶ Article 230 TEC: "*The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission [...] Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former*".
- ⁷ ECJ 13 May 1971, C-41-44/70, [1972] *ECR*, p. 411 (*International Fruit Company NV and others v. Commission*), pars. 25 and 29.
- ⁸ ECJ 15 July 1963, C-25/62, [1963] *ECR*, p. 95 (*Plaumann & Co v. Commission*); ECJ 17 June 1980, Joined cases 789/79 and 790/79, [1980] *ECR*, p. 01949 (*Calpak*), par. 9.
- ⁹ *Ibid.*
- ¹⁰ Article 230 TEC speaks of regulations only, but according to Jans et al., it cannot be excluded that the provision applies as well to directives that are of "direct and individual concern". But as the Member States usually enjoy some discretion when implementing the directive, directives will usually fail to pass the test of "direct concern" (Jans et al. 2002, p. 311). Obviously, the directives on asylum could never be of "direct concern" to an individual as they state minimum standards.
- ¹¹ Article 232 TEC: "*Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established. [...] Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion*".
- ¹² Craig & De Búrca 2003, p. 523; Jans et al. 2002, p. 312.
- ¹³ ECJ 18 march 1975, C-72/74, [1975] *ECR*, p. 401 (*Union Syndicale*).
- ¹⁴ When domestic courts are obliged to refer a question for a preliminary ruling as well as the peculiarities of Article 68 TEC will be discussed in paragraph 9.3.

- ¹⁵ ECJ 19 June 1990, C-213/89, [1990] ECR I-2433 (*Factortame I*), par. 19.
- ¹⁶ For example, in *Factortame I* it ruled that domestic law should provide for suspension of legislation within the scope of Community law if there is doubt on the validity of the involved Community act – *Factortame I*, pars. 20-21.
- ¹⁷ ECJ 18 December 1976, C-33/76, [1976] ECR, p. 1989 (*Rewe Comet*), par. 13.
- ¹⁸ See Craig & De Búrca 2003, p. 232, Jans et al. 2002, p. 74, both with references to case law.
- ¹⁹ ECJ 14 December 1995, Joined cases C-430/93 and 431/93, [1995] ECR, p. I-4705 (*Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*); Craig & De Búrca pp. 249-252 and Jans et al. 2002, pp. 360-363.
- ²⁰ Prinssen mentions state liability in damages for non-implementation of directives as a third way Community law can have effect in the domestic legal order (Prinssen 2004, p. 1 and 57f).
- ²¹ Craig & De Búrca p. 211-219; Betlem 2002, p. 79f; Prechal 1995, pp. 200f.
- ²² Betlem & Nollkaemper 2003, pp. 572f and Craig & De Búrca 2003, pp. 211-219.
- ²³ Cf. Jans et al. 2002, p. 38 with references.
- ²⁴ Cf. Prinssen 2004, pp. 41f.
- ²⁵ ECJ 10 April 1984, 14/83, [1984] ECR, p. 1891 (*Von Colson and Kamann*), pars 25-28; cf. Prinssen 2004, pp. 78f.
- ²⁶ *Von Colson and Kamann*, par. 28.
- ²⁷ ECJ 13 November 1992, C-106/89, [1990] ECR, p. I-4135 (*Marleasing*), par. 8.
- ²⁸ Jans et al. 2002, pp. 142-3.
- ²⁹ Prinssen 2004, pp. 47-8.
- ³⁰ Cf. *Marleasing*, par. 8; ECJ 8 October 1987, C-80/86, [1987] ECR, p. 3969 (*Kolpinghuis*), par. 32. See on these limits Prechal 1995, pp. 222-238, Jans et al. 2002, pp. 142-145.
- ³¹ Prinssen 2004, pp. 48-51 with references.
- ³² *Ibid.*
- ³³ Cf. number [377].
- ³⁴ Cf. Article 20 PD, discussed under number [444]. Other examples are the requirement of residence in a specific place for entitlement to material reception conditions (Article 7(4) RSD), or the obligation to submit the application and elements to substantiate it “as soon as possible” (Article 4(1) QD); failure to do so constitutes a ground for refusal (Article 23(4)(i) PD).
- ³⁵ Jans et al. 2002, p. 95.
- ³⁶ Opinion A-G Van Gerven 27 October 1993, C-128/92, [1994] ECR, p. I-1209 (*Banks*), par. 27.
- ³⁷ Cf. ECJ 19 January 1982, C-8/81, [1982] ECR, p. 53 (*Becker*), par. 25.
- ³⁸ Prechal 1995, p. 281.
- ³⁹ ECJ 23 February 1995, Joined cases C-358/93 and C-416/93, [1995] ECR, p. I-0361 (*Aldo Bordessa*), pars 32-34.
- ⁴⁰ Prinssen 2004, p. 13 with references to case law.

- ⁴¹ ECJ 18 October 2001, C-441/99, [2001] *ECR*, p. I-7687 (*Riksskatteverket v. Soghra Gharehveran*), par. 44.
- ⁴² ECJ 24 October 1996, C-72/95, [1996] *ECR*, p. I-5403 (*Kraaijeveld*), par. 56, referring to ECJ 1 February 1977, C-51/76, [1977] *ECR*, p. 113 (*VNO*), pars. 22-24.
- ⁴³ CFI 11 December 2001, T-191/99, [2001] *ECR*, p. II-3677 (*Petrie et al. v. Commission*). par. 34, referring to ECJ 5 February 1963, C-26/62, [1963] *ECR*, p. I-12 (*Van Gend en Loos*).
- ⁴⁴ ECJ 11 January 2001, C-403/98, [2001] *ECR*, p. I-103 (*Azienda Agricola Monte Arcosu Srl*), par. 26.
- ⁴⁵ Cf. Opinion A-G Geelhoed 13 December 2001, C-253/00, [2002] *ECR*, p. I-7289 (*Antonio Muñoz*), par. 38.
- ⁴⁶ Cf. Jans et al. 2002, pp. 138f.
- ⁴⁷ ECJ 8 October 1987, C-80/86, [1987] *ECR*, p. 3969 (*Kolpinghuis*), par. 9.
- ⁴⁸ Hailbronner 2000, p. 69.
- ⁴⁹ ECJ 8 April 1976, C-43/75, [1976] *ECR*, p. 455 (*Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*), par. 57.
- ⁵⁰ Article 1 QD, that defines, according to its heading, both “subject matter and scope”.
- ⁵¹ Once another Member State accepted its responsibility, the Member State where the application was lodged does not have to perform any further examination, cf. number [427].
- ⁵² Cf. Articles 13 and 14 DAR.
- ⁵³ Article 15(1) DR, Article 13(4) DAR.
- ⁵⁴ Preamble recitals (5) and (34) QD.
- ⁵⁵ Article 6(2) RSD; cf. number [601].
- ⁵⁶ Article 7(2) RSD.
- ⁵⁷ Article 10 RSD.
- ⁵⁸ Article 13(1) and (2) RSD; Article 14 RSD sets further rules on the provision of housing.
- ⁵⁹ Article 12 TPD.
- ⁶⁰ Article 13(1) and (2) TPD.
- ⁶¹ Prinssen 2004, pp. 101-3, discussing relevant case law.
- ⁶² Prinssen 2004, p. 103, referring to other authors and to statements to this extent in conclusions by A-G Jacobs.
- ⁶³ ECJ 18 December 1997, C-129/96, [1997] *ECR*, p. I-7411 (*Inter-Environnement Wallonie ASBL v. Région Wallonne*), par. 45.
- ⁶⁴ Prinssen 2004, pp. 198-200; Jans et al. 2002, p. 145 however derive a slight preference for solving conflicts by giving indirect effect to Community law from the Court’s case law.
- ⁶⁵ See Prinssen 2004, p. 201, footnote 8 for references.
- ⁶⁶ Cf. Prinssen 2004, pp. 211-3 and 225-6.
- ⁶⁷ Although, the Commission as well as Member States can lodge appeal to the Court of Justice in case a Member State allegedly infringes on its obligations under the Treaty on European Community (Articles 226 and 227 TEC). This type of appeal will not be addressed below.

- ⁶⁸ This is the system. In practice the Luxembourg courts do not always refrain from applying Community law to the case in which the reference was made, cf. ECJ 11 July 2002, C-60/00, [2002] ECR, p. 06279 (*Carpenter*) where the ECJ remarked: “*A decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety* (par. 43).” But even then it is the domestic court that applies the rule formally; in the case of *Carpenter*, it was the referring UK Court that had to quash the refusal by the Secretary of State.
- ⁶⁹ Cf. Article 234 under (a) and (b) TEC, paraphrased in Article 68(1) as questions “*on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title*”. Article 234 under (c) TEC further provides for preliminary rulings on “*the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide*”. Apparently the Court is not competent to give a preliminary ruling on statutes of bodies established under Title IV of the Treaty.
- ⁷⁰ Craig & De Búrca 2003, p. 532.
- ⁷¹ Such analogous application of Refugee Convention protection would not be incompatible with that instrument, cf. the Final Act of the Plenipotentiaries on Refugees and Stateless Persons under E, quoted under [222].
- ⁷² Cf. Preamble recital (9) QD, quoted under number [297].
- ⁷³ International law requires that states withhold protection to certain persons within the scope of Article 1F RC – for example, torturers. This does not run counter to the findings in the present paragraph, as in such a situation it would be the relevant rule of international law that excludes the person concerned from protection, not Article 12 QD.
- ⁷⁴ And see Articles 34 QD, 12 RSD, 4(2) and (3) and 10(2) FRD.
- ⁷⁵ Handoll 2004, p. 141.
- ⁷⁶ Preamble recital (6) QD.
- ⁷⁷ See numbers [274] and [275]. Article 2(e) QD refers to exclusion, which the prohibitions of refoulement don’t, but that difference does not detract from the point made here.
- ⁷⁸ That is, apart from the refugee status pursuant to Article 14(6) or 24(1) QD (see paragraph 8.5), which exceptions are not relevant here.
- ⁷⁹ Preamble recital (18) QD.
- ⁸⁰ Ibid.
- ⁸¹ Preamble recital (18) QD.
- ⁸² Cf. Spijkerboer & Vermeulen 2005, p. 65.
- ⁸³ Preamble recital (5) PD.
- ⁸⁴ Preamble recital (11) PD.
- ⁸⁵ Preamble recital (13) PD.
- ⁸⁶ Preamble recital (27) PD: “*It reflects a basic principle of Community law that the decisions*

taken on an application for asylum and on the withdrawal of a refugee status must be subject to an effective remedy before a court or tribunal in the meaning of Article 234 of the Treaty establishing the European Community”.

⁸⁷ Preamble recital (8) FRD.

⁸⁸ Article 369 CFE is identical to Article 234 TEC, save for the deletion of sub-paragraph 234 under (c) (“the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide”), which has no relevance for the present study.

⁸⁹ ECJ 6 October 1982, C-283/81, [1982] ECR, p. 3415 (*Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*), par. 10.

⁹⁰ According to Barents however, the insertion of the power of appraisal in Article 68(1) in effect renders the duty to refer into a mere competence (Barents 1999, p. 374); Hailbronner states that the upper court has the duty to refer, but enjoys the power of appraisal that only courts of lower instance enjoy under Article 234 TEC (Hailbronner 2000, pp. 94-95). But cf. *CILFIT*, quoted above.

⁹¹ Barents 1999, p. 374 points out that Article 68(1) appears to be modelled on Article 3 of the Protocol to the Brussels Convention, according to which only supreme and appellate courts can refer questions on the Convention for preliminary ruling to the Court of Justice. Articles 3(1) and 3(2) *jo* 2(2) of this *Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* (OJ [1975] L 204/28) confer an exclusive competence to ask the Court for preliminary rulings to specific appellate Courts. Questions on the Brussels Convention stated by courts of first instance are indeed inadmissible (for example, ECJ 9 November 1983, C-80/83, [1983] ECR, p. 03639 (*Habourdin International SA and Banque nationale de Paris v. SpA ItaloCremona*)).

⁹² Cf. Hailbronner 2000, p. 94, with references to relevant Community documentation; De Zwaan & Bultema 2002, p. 71. Some commentators explain the limitations to judicial control by the Court of Justice by reference to the “intergovernmental” provenance of Title IV (cf. Fletcher 2003, p. 533).

⁹³ De Zwaan & Bultema 2002, p. 70.

⁹⁴ *Foto-Frost*, par. 15.

⁹⁵ The Court of First Instance observed in *Jégo-Quéré* that the applicant did not meet the admissibility criteria of Article 230 TEC as formulated in *Plaumann* (ECJ 15 July 1963, C-25/62, [1963] ECR, p. 95, see number [632]), but that the other branch of the Community judicial protection system did not offer effective legal protection. On the basis of an extensive interpretation of Article 230 TEC, it declared the applicant admissible in its direct appeal against the allegedly invalid Community measure (CFI 3 May 2002, T-177/01, [2002] ECR, p. II-02365 (*Jégo-Quéré & Cie SA v. Commission*), par. 51). The Court of Justice however reaffirmed the *Plaumann* doctrine a few months later in *Unión de Pequeños Agricultores v. Council* (ECJ 25 July 2002, C-50/00, [2002] ECR, p. I-06677 (*Unión de Pequeños*

Agricultores v. Council), par. 36), stating that “it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force” (ibid., par. 45).

⁹⁶ *Foto-Frost*, par. 15 and 18.

⁹⁷ ECJ 17 July 1997, C-334/95, [1997] *ECR*, p. I-04517 (*Krüger GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*), par. 44, referring to ECJ 9 November 1995, C-465/93, [1995] *ECR*, p. I-3761 (*Atlanta Fruchthandelsgesellschaft*).

⁹⁸ *Atlanta*, par. 19. In that paragraph the Court speaks of “ordering interim measures to settle or regulate contested legal positions or relationships with reference to a national administrative measure based on a Community regulation”, i.e. interim measures that set aside a national measure, but in par. 24 it states that “[t]he interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law”. Hence, the reasoning also applies to suspension of Community measures .

⁹⁹ ECJ 15 July 1964, C-6/64, [1964] *ECR*, p. 585 (*Costa v. E.N.E.L.*). See Craig & De Búrca 2003, p. 438; Hailbronner 2000, p. 95, with references to other authors.

¹⁰⁰ A third exception applies when the European Court has already interpreted the Community provision involved (the “acte éclairée” doctrine, cf. ECJ 6 October 1982, C-283/81, [1982] *ECR*, p. 3415 (*CILFIT*), par. 21). This exception is of no relevance for us, as the Court has not yet ruled on any provision of European asylum law.

¹⁰¹ *CILFIT*, par. 21.

¹⁰² *CILFIT*, par. 10.

¹⁰³ *CILFIT*, par. 16.

¹⁰⁴ *CILFIT*, pars. 16-21.

¹⁰⁵ In its judgement of 28 April 1988, Joined cases C-31/86 and 35/86, [1988] *ECR*, p. 02285 (*LAISA and CPC España CA v. Council*) the Court ruled that it could not review the legality of provisions of the Act of Accession of Spain and Portugal, as they ranked as primary EC law; cf. Vanhamme 2001, p. 153-154.

¹⁰⁶ Hailbronner 2000, p. 43.

¹⁰⁷ Cf. Article 240 TEC: “Save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.”

¹⁰⁸ Hailbronner 2000, p. 43.

¹⁰⁹ Whether temporary protection status awards the refugee the rights that the Refugee Convention entitles him to is another matter. If temporary protection status falls short of his legitimate claims under international asylum law, it is the Temporary Protection Directive or rather, its application that infringes on the refugee’s rights, not the Treaty.

¹¹⁰ I.e. insofar as asylum seekers being unrecognised refugees can claim asylum rights under the Convention; see Chapter 8.7.1 above.

- ¹¹¹ See number [92].
- ¹¹² Hins & De Reede 1997, pp. 39-40.
- ¹¹³ Lawson 1999, pp. 487-489; Besselink 1998, pp. 660-661.
- ¹¹⁴ ECtHR 15 November 1996, *Rep.* 1996-V, p. 1617 (*Cantoni v. France*); confirmation can be found in later judgements such as ECtHR 16 April 2002, *Rep.* 2002-III (*Dangeville v. France*).
- ¹¹⁵ *Cantoni v. France*, par. 28.
- ¹¹⁶ *Cantoni v. France*, par. 30.
- ¹¹⁷ ECtHR 30 June 2005, appl. no. 45036/98 (*Bosphorus Hava Yolları Turizm ve Ticet Anonim Serketi v Ireland*), par. 157.
- ¹¹⁸ Cf. ECtHR 18 February 1999, *Rep.* 1999-I (*Waite and Kennedy*), par. 59; ECtHR 21 November 2001, *Rep.* 2001-XI (*Al-adsani*), par. 53.
- ¹¹⁹ *Bosphorus*, par. 159.
- ¹²⁰ *Bosphorus*, par. 163.
- ¹²¹ *Bosphorus*, par. 164.
- ¹²² *Bosphorus*, par. 164.
- ¹²³ *Bosphorus*, par. 165.
- ¹²⁴ *Bosphorus*, par. 164.
- ¹²⁵ In his discussion of the (not completely similar) notion of equivalent protection as applied by the European Commission of Human Rights in its decision of 9 February 1990, appl. no. 13258/87 (*M&Co v. Germany*); Lawson 1999, pp. 388f.
- ¹²⁶ *Bosphorus*, par. 166.
- ¹²⁷ *Bosphorus*, par. 166.
- ¹²⁸ *Matthews*, par. 32: “the Court observes the acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting party”, confirmed in *Bosphorus*, par. 152.
- ¹²⁹ See Lawson 1999, pp. 45-51.
- ¹³⁰ Hailbronner 2000, p. 45.
- ¹³¹ ECtHR 18 January 1978, Ser. A vol. 25 (*Ireland v. United Kingdom*), par. 240.
- ¹³² ECtHR 22 October 1981, Ser. A vol. 45 (*Dudgeon v. United Kingdom*), par. 41.

Chapter 10

Assessment

In paragraph 1.2, the object of this inquiry was defined as the relation between European law on asylum and international law, and in particular the effects of European asylum law on the legal position of persons entitled to asylum under international law. I first addressed the way in which the two systems of law affect each other (Chapter 2), and the extent of competencies and obligations of the Community as regards international asylum law (Chapter 3). The main findings on both issues will be summarised and commented on in paragraph 10.1. Subsequently, the European legislation on asylum was analysed, and its conformity with international asylum law discussed (Chapters 4 to 8), as well as the judiciability advantages that Community law may offer the individual (Chapter 9). The findings on these matters are discussed in paragraph 10.2. Some remarks on future developments will be made in paragraph 10.3.

10.1 European asylum law and international asylum law

[716] The rules of international law and primary Community law discussed in Chapters 2 and 3 suggest that the legal position of third country nationals could only exceptionally be adversely affected by Community law on asylum for several reasons. To begin with, the transfer of powers on asylum to the Community has not brought change to the scope or content of the Member States' obligations under international asylum law.¹ The Refugee Convention, the Covenant on Civil and Political Rights, the Convention Against Torture and the European Convention on Human Rights were all concluded well before the Treaty of Amsterdam, and count among their signatories many non-Member States. Thus, claims by third country nationals to the Member States in their capacity as states party to the instruments of international asylum law cannot, in principle, be adversely affected by European asylum law. In principle, for this statement is subject to three exceptions (addressed below).

[717] When a rule of European law on asylum conflicts with some rule of international asylum law, the latter has precedence. This precedence is not due to hierarchical superiority – hitherto, the international community of states has not accepted the peremptory nature of rules of international asylum law.² Rather, conflicts should be solved by conciliatory interpretation of the rule of European law with the rule of international law.³ European law gives

ample opportunity for such conciliatory interpretation. To begin with, pursuant to Article 63 TEC as well as to relevant general principles of Community law, European rules on asylum should be applied and interpreted in accordance with the Refugee Convention and relevant treaty law.⁴ Further, most of the rules that address international asylum law can, according to the Treaty on European Community, only set ‘minimum standards’, which by nature allow Member States to diverge in favour of the person to whom they owe protection under international law.⁵ Rules that preclude domestic legislation that deviates from European law in order to comply with obligations under international asylum law would not be minimum standards, and therefore invalid.⁶

[718] However, not all rules of European asylum law are necessarily minimum standards. The Treaty on European Community allows for exhaustive rules on the allocation of applicants for asylum within the European Union, and the Constitution for Europe allows for such ‘maximum standards’ on many more issues.⁷ Thus, European asylum law may in the future contain rules that require treatment of applicants at odds with the Member States’ obligations under international law. Then, conciliatory interpretation may prove impossible. According to Article 307 TEC (and its successor Article 435 CFE), in such a case European law cedes precedence to the obligations flowing from the instruments predating the entry into force of the Treaty of Amsterdam.⁸

The priority of international law pursuant to this provision is subject to two restrictions. First, according to the Court of Justice “it cannot be excluded” that Member States are obliged to adjust or even denounce an instrument of international law if conflicts with European law cannot be solved in another way.⁹ In practice, it is most unlikely that this *ultimum remedium* would apply to international law on asylum, if only because of the strong commitment of the Community to these instruments. Second, if the Court of Justice rules that a certain rule of European asylum law is in full accordance with international law, Article 307 TEC may not apply.¹⁰ In such a case, domestic courts face a conflict between two obligations for which international treaty does not offer a solution.¹¹ But under present European asylum law such a conflict is hard to imagine for the reasons set out above.

[719] Another reason why it would appear that European asylum law could not negatively affect the legal position of persons entitled to protection under international law, is the strong commitment to observing international law, expressed in primary Community (and Union) law. Regulations and directives

based on Article 63(1) TEC must be “in accordance with the Refugee Convention and other relevant treaties”; those based on Article 63(3)(a) must be compatible with international agreements.¹² A similar clause on Article 63(2) is absent, but the relevant rules of international law may further serve as a standard of review by inspiring “general principles of Community law”, which review would amount to the same thing.¹³ This review of “accordance” with international law applies not only to acts by Community organs, but also to implementation acts by the Member States.¹⁴

These requirements should secure that European asylum law and executive acts based on it are in conformity with international asylum law.¹⁵ Moreover, this standard of review reinforces the juridical position of persons within the scope of international asylum law because of the judiciability advantages of Community law. To begin with, Community law requires an effective remedy for infringement on Community rights.¹⁶ Moreover, the Court of Justice reviews compliance by Community institutions as well as Member States (acting within the scope of Community law) with Community law – including compliance with the obligation to act in accordance with international asylum law. So, the Court of Justice may supervise interpretation and application of the instruments of international law, which is of particular interest as regards the Refugee Convention as there is no treaty monitoring body attached to this instrument that could address application in individual cases.

[719a] It follows from recent case law by the European court of Human Rights that under certain circumstances, human rights protection provided for by the Community legal order replaces to a certain extent such protection as established by the European Convention of Human Rights. Acts by Member States which are based on Community law that leaves them (some) discretion are subject to the usual judicial supervision by the Strasbourg Courts. But acts based on Community law that leaves no discretion are not, or rather, not necessarily. According to the European Court of Human Rights, the Community legal order provides for both substantive guarantees as well as mechanisms that provides for protection of fundamental rights that is “equivalent” or “comparable” to that under the Convention. Member State acts based on Community law leaving no discretion are therefore presumed to be in accordance with the European Convention. This presumption is open to rebuttal, however, if the Community protection of human rights was manifestly deficient.

Arguably, this notion of equivalent protection is flawed, if only because the Community protection system does not provide for appeal by individuals to a

supranational court. It is questionable whether this equivalent protection notion would apply to asylum law. If it does, and if the Community issues asylum law that leaves member States no discretion, the position of the individual would be adversely affected.

[720] Finally, the legal position of applicants may be reinforced by the Charter of Human Rights.¹⁷ Although the current legal status of this instrument is unclear, by virtue of explicit references to it in European legislation on asylum its provisions may be applied as means of interpretation of those instruments.¹⁸ The Constitution for Europe, moreover, settles all uncertainty by incorporating the Charter, and hence granting it the status of primary Union law.

Charter provisions cannot adversely affect the legal position of persons within the scope of international asylum law, as its provisions may not be interpreted as restricting the rights laid down in (*inter alia*) the instruments of international law to which all Member States are party.¹⁹ On the other hand, several provisions extend the scope of protection as compared to international asylum law. It requires compliance with the requirements on fair trial ex Article 6 ECHR, which provision does not apply to migration law.²⁰ And maybe most remarkable, it recognises a “right to asylum”, which is absent in international law. The scope of obligations implied by the duty to “guarantee the right to asylum” is somewhat insecure. Arguably, it implies that refugees (or other persons who have a “right to asylum”) may not be expelled to a third country unless it is certain that he will be treated there in accordance with basic human rights standards, and that if they cannot be expelled, they are entitled to a settled status and secondary rights.²¹

In summary, it appears that European asylum law could only exceptionally detract from protection under international asylum law, as it must be in conformity with it. Moreover, it extends the scope of protection as compared to international asylum law in several respects.

10.2 The Community legislation

The Treaty basis

[721] These favourable effects of European asylum law materialise only if and insofar as legislation on asylum is adopted. For Article 63 TEC, general principles of Community law, and the Charter do not impose a prohibition of *refoulement*, confer a right to asylum and so on, but set standards for review of Community law and Member States acts within the scope of Community law.

The legal basis for secondary Community law on asylum, Article 63 TEC, implies few if any restrictions for the material scope of asylum legislation. Article 63(1) and (2) TEC neatly delimit on which topics measures had to be adopted before 1 May 2004: standards on qualification, procedures, reception standards of applicants, mechanisms and criteria for allocation of applicants, and rules on temporary and subsidiary protection.²² But these provisions do not exhaustively address asylum matters. Article 63(3)(a) TEC functions as a residual competence for other issues concerning asylum,²³ and has indeed served as the legal basis for rules on the secondary rights of refugees and subsidiary protection beneficiaries, and, arguably, criteria for considering a third country “safe”.²⁴ Likewise, Article 266 CfE contains no restrictions on the substantial scope of secondary Union legislation.²⁵

The objectives of legislation on international protection as defined in Article 61, reinforcing the freedom of movement by reducing secondary movements of third country nationals, and the safeguarding of their human rights, both allow for a high level of harmonisation.²⁶ The characterisation of most measures on international protection as “minimum standards” in Article 63 TEC does not restrict this level: the characterisation as minimum standards addresses the division of powers between the Community and the Member States, not the content of the Community legislation.²⁷

The scope of Article 63(1), (2) and (3) TEC may be relevant over the next few years, as different decision making procedures apply to the various subparagraphs.²⁸ The delimitation of scope in the provision is further of interest as it provided for the basic layout of the Common European Asylum System, established by the present legislation.²⁹

The concept of the ‘Common European Asylum System’ was introduced by the European Council Tampere Conclusions, which exerted far-going impact on the present legislation in three respects.³⁰ First, these Conclusions stated far more explicitly and far more emphatically than Article 61, that safeguarding the human rights of applicants and other CEAS status beneficiaries is a central objective of Community legislation on asylum. Second, it defined quite ambitious levels of harmonisation that the legislation should bring about. Third, by introducing the concept of a Common European Asylum System it suggested that the Community legislation should show coherence.

The Common European Asylum System

[722] The Common European Asylum System that resulted, establishes (mainly)³¹ four statuses: refugee status, subsidiary protection, applicant and temporary protection status.³² For each of these statuses European asylum law sets

rules on qualification, and on secondary rights: reception or residence conditions as well as rules on family unity.³³ The legislation further establishes rules on asylum procedures and rules on allocation for applicants for asylum and for temporary protection.³⁴ The rules on allocation are based on the exception of the safe third country. Together, the five Directives and three Regulations on asylum hitherto adopted address most aspects of international asylum law.

But do the rules laid down in these instruments form a system, a set of rules that make up a more or less coherent whole? To a certain extent, they do. All instruments share the same objectives. They apply common definitions and concepts. Moreover, they relate in the sense that rules laid down in one instrument serve to define scope or content of rules laid down in another one. Thus, the Procedures Directive defines the scope of beneficiaries of the Reception Standards Directive, as well as the geographical scope (and partially, the personal scope – see below) of the rules on qualification laid down in the Qualification Directive.³⁵ The latter instrument sets rules on the foundedness of claims for protection, as meant in the Procedure Directive.³⁶ And the decision that installs temporary protection may address qualification for subsidiary protection.³⁷

[723] But the discussion of the rules on qualification, procedures, allocation and secondary rights also revealed a lack of coherence in the European legislation on asylum. To begin with, the instruments show a lack of technical coherence. The relation between temporary protection and applications for asylum is quite unclear, which leads to uncertainty on the scope of application of the Procedures Directive and of the Dublin rules for allocation.³⁸ Further, different meanings are attached in various instruments or even within one instrument to identical terms or concepts (“international protection”, “examination”, family members, “determining authority”).³⁹ All this results in a lack of clarity on scope and content of rules on asylum.

Secondly, and more seriously, the present body of legislation on asylum shows a number of gaps and inconsistencies that result from the apparent lack of a clear concept of what issues should be addressed in order to achieve the objectives of this legislation. Most conspicuously in this respect, the Dublin Regulation, the Procedures Directive and the Reception Standards Directive apply to applicants for protection under the Refugee Convention only. Applicants for subsidiary protection fall outside the scope of these instruments in Member States that happen to run separate procedures for the two forms of protection.⁴⁰ If rules on procedures are needed for achieving the objectives of this legislation, preclusion of secondary movements and safe-

guarding the rights of third country nationals, there is no justification for this result.

The same applies to the absence of rules on the withdrawal of subsidiary protection; the absence of harmonisation on benefits for family members of subsidiary protection beneficiaries and applicants as opposed to those of refugees; the absence of rules on family reunification of subsidiary protection beneficiaries; and the absence of rules on procedures concerning grant or denial of secondary rights for refugee and subsidiary protection beneficiaries.⁴¹ Perhaps most striking is the absence of a coherent view on the nature of refugee status determination. Whereas the Qualification Directive explicitly acknowledges that such determination is “declaratory”, the standards of treatment set for applicants and, partially, temporary protection status beneficiaries rather evince a constitutivist reading of Refugee Convention provisions that should however be read in the declaratory sense.⁴²

These inconsistencies and gaps may be partially explained by the odd order of adoption of the various instruments. The instruments that address the core issues of qualification for refugee and subsidiary protection status and of asylum procedures were adopted later than the ones on more peripheral issues, like temporary protection, reception standards for applicants, and family reunification.⁴³ Unwillingness on the part of (some) Member States to adapt their domestic law on asylum also may explain a part of these inconsistencies. In particular, the Procedures Directive and the Reception Standards Directive in many respects confirm existing disharmony rather than provide for a common approach. In this respect, the second phase of the harmonisation may bring change because of the new rules on decision-making.⁴⁴

Conformity with international asylum law

[724] An assessment of the degree to which European legislation secures compliance with international asylum law should start with the observation that a number of issues relevant for protection under international law are not addressed by present European legislation on asylum. This holds true for a number of the gaps signalled above, such as the absence of rules on procedures for qualification for subsidiary protection status in some Member States and on withdrawal of this status. It also holds true for issues like the concept of group persecution, the causal nexus between Convention grounds and absence of protection, or the grounds for rebuttal that the Member States are safe third countries.⁴⁵ These gaps do not, in themselves, affect the scope of protection: the relevant subject matter is simply left to domestic legislation, as it was before. Whether it is wise to leave these matters to domestic law in view

of the objectives of European asylum law is another matter. Here, we should assess how far the standards that are set are in conformity with (or exceed) the level required by international law, and where they set lower standards.

[725] On the credit side, the first thing to be mentioned is the right to asylum established by European asylum law. The Dublin Regulation and the Procedures Directive require that each application lodged within the European Union be examined; if the applicant qualifies for protection under the Qualification Directive, he must be granted refugee or subsidiary protection status.⁴⁶ Although subject to a number of exceptions (that will be addressed below), this right to asylum contributes considerably to observance of the Refugee Convention. The denial of examination when the temporary protection regime applies is limited in time, and does not preclude ensuing examination for the non-temporary statuses.⁴⁷ Moreover, the standards of treatment do to a considerable extent secure that refugees are treated in accordance with the Refugee Convention.⁴⁸ Persons within the scope of Articles 3 ECHR (and 7 CCPR) are, under international law, entitled to protection from *refoulement* only, whereas subsidiary protection status ensures them a set of secondary rights.⁴⁹

Further, European asylum legislation requires compliance with international asylum law on a number of important points. The definition of persons eligible for subsidiary protection codifies the prohibition of *refoulement* ex Article 3 ECHR.⁵⁰ The Qualification Directive further provides for regulations on issues like agents of persecution or serious harm and of the Convention ground “particular social group” that are, arguably, in conformity with international law.⁵¹ As to asylum procedures, the Procedures Directive requires an effective remedy to a court or tribunal against negative decisions.⁵² The requirement that applicants should, in principle, have the opportunity to a personal hearing may also contribute to examination in accordance with relevant rules of international law.⁵³ Of particular interest, finally, is the extension of the scope of subsidiary protection beyond the scope of protection offered by the prohibitions of *refoulement*, pursuant to Article 15(c) QD.⁵⁴

[726] On the other hand, some provisions of European asylum law suggest a level of treatment that falls below the standards set by international asylum law. In particular, the definition of “actors of protection” for the purposes of qualification for refugee status and, arguably, subsidiary protection status is too wide; hence, it suggests that Member States may turn down applications of persons who qualify for refugee status under Article 1 RC.⁵⁵ Article 27 and

even more so Article 35A PD suggest or explicitly allow for arrangements for rebuttal of the presumption of safety of third countries that are at variance with relevant international law.⁵⁶ Individual access of applicants to asylum procedures is not sufficiently secured, and the grounds for refusal of “subsequent” applications, or waiving examination of “dependant” applicants are likewise at odds with international law.⁵⁷

These provisions all suggest treatment of applicants (or other CEAS status beneficiaries) at variance with international law. Of course, the relevant rules of Community law must be interpreted and applied “in accordance with the Refugee Convention and other relevant treaties”. On issues that fall within the scope of Community law, the Court of Justice can be approached to rule on the interpretation of this deficient secondary legislation – among other things, on the rules on agents of protection, and the standards for rebuttal set by Articles 30B and 33 PD.⁵⁸ But other issues are explicitly left to domestic law, such as the suspensive effect of appeal against negative decisions, and the issue of individual access. Here, European law offers no protection.

[727] On balance, then, does European asylum law deteriorate or improve the legal position of persons entitled to international protection? The answer depends on the view on European law one chooses to take. One can conceive of European asylum law as another set of standards on the treatment by the Member States of persons in need of international protection, next to international asylum law. As these European standards must be interpreted and applied in accordance with international asylum law, they can only improve the position of the alien. Thus perceived, only the rules that reinforce the legal position of refugees and others in need of protection count. There are many such rules: the requirements on application of the safe third country exception that are stated, some rules on qualification for refugee and subsidiary protection status, the requirements on the granting of secondary rights, the rules on family reunification, the requirement of an effective remedy before a court, the right to have one’s claim examined and finally, if the third country exception does not apply, to the granting of a status. Together, these standards make up a body of law that in a comprehensive way addresses and secures protection for those in need of it – arguably, the most important source of protection in the European Union next to the Refugee Convention.

The assessment, however, will be quite different if one primarily conceives of European asylum law as a framework or blueprint for the asylum law systems of the Member States. Then the gaps in the legislation and the rules that suggest standards falling short of international law raise concern. True, most

rules are minimum standards that may be exceeded by domestic law, and must moreover be interpreted and applied by the organs of the Member States in accordance with international law. But will they be read and applied accordingly? One may doubt this, especially where European legislation suggests that its standards address issues of international law comprehensively, and in accordance with relevant treaties.

For example, after the adoption of a list of safe third countries of origin by the Council, the Member States are *obliged* to consider the application by a national of such a country as unfounded, unless the applicant submits “serious grounds” for considering his country unsafe in his particular case.⁵⁹ This standard may be at variance with international law. Arguably, this arrangement *may* be construed as a minimum standard: Member States *may* apply a more lenient standard for rebuttal, and they *may* suspend the obligation to consider the application as unfounded by requesting removal of a country from the list. But European law gives no incentives for doing so – rather the opposite. Likewise, according to Article 35A PD applications by third country nationals that are safe pursuant to some general assessment by the Council need not be examined. Member States may provide for an arrangement under domestic law that allows applicants to rebut this presumption of safety, as international law requires.⁶⁰ But the Directive does not secure it – rather, it quite strongly suggests that Member States may do without.

[728] In this respect, we may observe that European asylum law allots the Council a role in the interpretation of the Member States’ obligations under international asylum law. By qualified majority voting, the Council may draw up the minimum common list of countries of origin that must be regarded as safe, and of neighbouring third countries that are safe for the purposes of Article 35A PD.⁶¹ Further, it may provide for “guidance” on the identification of actors of protection that Member States must take into account.⁶² Such acts may exert pressure to line up with the common approach. If anything, they provide for a strong incentive for individual Member States not to assess for themselves whether a country of origin or a neighbouring third country is indeed safe, or whether some “actor” actually does provide for protection as required by the Refugee Convention.

Further, the present legislation on asylum authorises numerous devices for examination of applications without addressing all aspects that may be relevant for the foundedness of the claim. The variants of the exception of the safe third country, the various arrangements for dealing with subsequent applications, and the safe country of origin concept may all result in the proliferation

of devices that restrict access to qualification on the merits of the claim. Moreover, European asylum law provides for various arrangements on these issues that differ as to the safeguards or requirements that apply. Such difference can not be justified under international law.⁶³ Again, the Member States may implement and apply these variants in conformity with their obligations under international law. But they are tempted to adjust their domestic law to the variant that states the lowest level of protection.

[729] To a certain extent, some of the above-mentioned negative effects of European asylum law for the legal position of persons entitled to protection under international law may be precluded by a review by the Court of Justice. Arguably, there is no reason to doubt the conformity of its case law with international law standards.⁶⁴ Nevertheless, the role of the Court may turn out to be modest. In asylum matters, it cannot be approached by individual claimants, only by domestic courts in the preliminary procedure.⁶⁵ Access to the Court of Justice is curtailed by Article 68 TEC, according to which, courts of first instance cannot ask preliminary questions on interpretation of European asylum law (at least as long as the validity of this law is not brought into question).⁶⁶ In addition, Courts that could and should refer may be reluctant to do so.⁶⁷

[730] Finally, standards in European asylum law may negatively affect international asylum law itself. The interpretation of any treaty is informed by state practice and this is an important means especially for the Refugee Convention.⁶⁸ The legislation on the reading of this Convention in European asylum law may in this way influence the reading of that instrument. As to the other instruments of international law, this effect may be countered by views and rulings of the monitoring bodies, in particular of the European Court of Human Rights.⁶⁹ In the past, its reading and application of the European Convention proved not to be informed by European legislation or by the Dublin Convention, the forerunner of the Dublin Regulation.⁷⁰

In summary, European asylum law importantly contributes to the protection of persons within the scope of international asylum law, but there are good reasons to suppose that it will also negatively affect this protection. The scope of these negative effects depends on the courses of action that Member States will take. They may accept European asylum law for what it is: a set of basic rules from which their domestic law can and must depart in order to secure compliance with their obligations under international law. But they may also apply Community law rules on asylum as standards that need not be surpassed. The supervisory role of the Court of Justice also stands or falls with

the willingness or unwillingness of the (highest) domestic courts to refer questions on interpretation.

10.3 Future developments

[731] The present body of European legislation on asylum is the result of only the first stage of establishing the Common European Asylum System. “In the long term”, after the second stage, this system should, according to Tampere Conclusions, encompass “uniform asylum status” and “common procedures”.⁷¹ These objectives are codified in the Constitution for Europe that added “uniform subsidiary protection status” and a “common system of temporary protection”.⁷²

This second stage started on May 1st 2004, but so far no new proposals for legislation have been submitted. The European Council adopted “The Hague program” on 5 November 2004, wherein it evaluated the results of the first stage and set out some aims for the second stage.⁷³ The second generation of legislation on asylum is not due before 2010, after evaluation of the implementation of the present instruments in 2007.⁷⁴ Meanwhile, co-operation between Member States in asylum matters should be pursued.⁷⁵

[732] The aims for the second generation are those set out in the Tampere Conclusions: a common asylum procedure and uniform statuses for refugee and subsidiary protection.⁷⁶ The European Council provides for only a few new guidelines for the layout of this second stage of the Common European Asylum system. The Commission is asked to issue a study on the “joint processing of asylum applications” outside the European Union.⁷⁷ This suggestion takes up previous initiatives by in particular the United Kingdom to establish processing centres outside the European Union.⁷⁸ Unlike those UK proposals, the Hague Program states that such processing abroad be “complementary” to the Common European Asylum System, i.e. complementary to the processing in the Member States.

Further, the European Council invites the Commission

“to present a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union.”⁷⁹

Does “joint processing” mean that processing and hence allocation of applicants may be centralised? This is hardly likely, as the European Council also invites the Council and the Commission “to establish in 2005 appropriate

structures involving the national asylum services of the Member States with a view to facilitating practical co-operation.” These structures should “assist” the Member States

“*inter alia*, in achieving a single procedure for the assessment of applications for international protection, and in jointly compiling [...] information on countries of origin. [...] After a common asylum procedure has been established, these structures should be transformed, on the basis of an evaluation, into a European support office for all forms of cooperation between Member States relating to the Common European Asylum System”.⁸⁰

Thus, it appears that examination will still be done by the Member States after 2010, with the assistance of a “European office”. The objective appears to be enhanced co-operation, rather than centralisation. Finally, the Hague Program speaks of a “single procedure for the assessment of applications for international protection”, which may suggest that the Procedures Directive should apply to applicants of subsidiary protection in all Member States.⁸¹

[733] The “level of ambition” of the Hague Program was inspired by the Constitution for Europe.⁸² Whether this instrument will enter into force in its present form is as yet uncertain, but arguably, most aims of the second stage legislation, common procedures, uniform statuses and the single procedure, could be realised just as well on the basis of the present Treaty on European Community.⁸³

The Commission observed in its “assessment of the Tampere program” that “the constraints of the decision-making process and of the current institutional context preclude the effective, rapid and transparent attainment of certain political commitments”.⁸⁴ In this respect, the circumstances have changed, even without the Constitution entering into force. Since “legislation defining the common rules and basic principles governing” the issues mentioned in Article 63(1) and (2) has been adopted, the normal decision-making procedure applies.⁸⁵ Thus, measures can be proposed only by the Commission, and are co-decided upon by the European Parliament and the Council, voting by qualified majority. If up till now decision-making was “constrained” by the peculiarities of the decision-making procedure, there is no need to wait for evaluation and a second stage in order to repair the most obvious shortcomings in present European legislation.

NOTES

- ¹ Cf. paragraph 2.1.
- ² Paragraph 2.1.3.
- ³ Article 30(2) VTC, paragraph 2.1.2.
- ⁴ Paragraphs 2.2.3 and 2.2.2.
- ⁵ Paragraphs 3.4 and 3.7.
- ⁶ Number [257].
- ⁷ Paragraphs 3.4 and 3.8.4.
- ⁸ Paragraph 2.1.4.
- ⁹ ECJ 4 July 2000, C-84/98, [2000] *ECR*, p. 5215 (*Commission v. Portugal*), cf. number [93].
- ¹⁰ Paragraph 9.4.
- ¹¹ See par. 2.1.5.
- ¹² Paragraph 2.2.3.
- ¹³ Paragraph 2.2.5.
- ¹⁴ Paragraphs 2.2.2.3 and 2.2.3.
- ¹⁵ Paragraphs 2.2.2.3 and 2.2.5.
- ¹⁶ Paragraph 9.1.1.
- ¹⁷ Paragraph 2.3.
- ¹⁸ Paragraphs 2.3.7 and 4.4.
- ¹⁹ Paragraph 2.3.2.
- ²⁰ Paragraph 6.3.1.
- ²¹ Paragraphs 2.3.5, 7.5.6 and 8.9.
- ²² Paragraph 3.3.3 and 3.3.4.
- ²³ Paragraph 3.3.2.
- ²⁴ Paragraph 3.3.3 and 4.3.
- ²⁵ Paragraph 3.8.5.
- ²⁶ Paragraphs 3.2 and 4.4.
- ²⁷ Paragraph 3.4.
- ²⁸ Paragraphs 1.5.4 and 3.3.2.
- ²⁹ Paragraph 4.2.
- ³⁰ Paragraphs 1.5.1 and 4.1.
- ³¹ Cf. paragraphs 8.5, 8.4.4 and 8.7.5.
- ³² See paragraph 4.2.
- ³³ Discussed in Chapters 5 and 8.
- ³⁴ Discussed in Chapters 6 and 7.
- ³⁵ Paragraphs 4.2, 6.2.4.2 and 8.7.1.
- ³⁶ Cf. paragraph 6.2.1 and 6.4.1.

- ³⁷ Paragraph 5.4.1.3.
- ³⁸ Paragraphs 6.1 and 7.2.2.
- ³⁹ Paragraphs 4.7, 6.1, 8.9, 6.2.4.1.
- ⁴⁰ Paragraph 4.7.
- ⁴¹ Paragraphs 8.6 and 8.9.
- ⁴² Paragraphs 8.7 and 8.8.
- ⁴³ Paragraph 1.5.1.
- ⁴⁴ Paragraphs 1.5.4 and 10.3.
- ⁴⁵ Paragraphs 5.3.1, 5.4.4 and 9.3.2, 7.5.6 and 9.3.2.
- ⁴⁶ Paragraph 6.2.1 and 8.9.
- ⁴⁷ Paragraph 8.8.2; cf. Hathaway 2003, p. 6.
- ⁴⁸ Paragraph 8.4.
- ⁴⁹ Paragraph 8.6.
- ⁵⁰ Paragraph 5.1.
- ⁵¹ Paragraphs 5.4.2 and 5.4.4.
- ⁵² Paragraph 6.3.2.
- ⁵³ Paragraph 6.2.4.2.
- ⁵⁴ Paragraph 5.4.1.2.
- ⁵⁵ Paragraph 5.4.3.
- ⁵⁶ Paragraphs 7.5.2 and 7.5.5.
- ⁵⁷ Paragraph 6.2.4.2 and 6.4.4.
- ⁵⁸ Paragraph 9.3.3.
- ⁵⁹ Cf. number [672].
- ⁶⁰ Paragraphs 6.2.3 and 7.5.5.
- ⁶¹ Paragraphs 6.4.5.2 and 7.5.3.
- ⁶² Paragraph 5.4.3.
- ⁶³ Paragraphs 6.6 and 7.5.6.
- ⁶⁴ Cf. paragraph 2.2.2.5.
- ⁶⁵ Paragraph 9.1.2.
- ⁶⁶ Paragraph 9.1.4.2.
- ⁶⁷ Paragraph 9.1.4.3.
- ⁶⁸ Paragraph 1.4.
- ⁶⁹ Paragraph 9.5.
- ⁷⁰ Paragraph 2.1.6 and 9.4.
- ⁷¹ Paragraph 1.5.1 and cf. 4.1.
- ⁷² Paragraph 3.8.2.
- ⁷³ Council doc. 13302/2/04 REV 2, “*The Hague Program – Strengthening freedom, security and justice in the European Union*”.
- ⁷⁴ The Hague Program, p. 8. Indeed the transposition term of the Qualification Directive ends

on 10 October 2006, and the term for transposing the Procedures Directive will end only in 2007 (see par. 1.5.3).

⁷⁵ Ibid., see below.

⁷⁶ The Hague Program, p. 7. The “common system for temporary protection” that figures in Article III-266 CfE is not mentioned.

⁷⁷ The Hague Program, p. 8.

⁷⁸ Cf. Bruin & Teitler 2003.

⁷⁹ The Hague Program, p. 8.

⁸⁰ Ibid.

⁸¹ The matter has already been studied: see K. Hailbronner, “*Study on the asylum single procedure (“one-stop shop”) against the background of the common European asylum system and the goal of a common asylum procedure*”, 2002, available at: http://europa.eu.int/comm/justice_home/doc_centre/asylum/studies/doc_asylum_studies_en.htm.

⁸² The Hague Program, p. 4.

⁸³ See par. 3.3.2. On the terms “common procedures” and “uniform statuses”, see paragraph 3.8.4.

⁸⁴ *Communication from the Commission to the Council and the European Parliament – Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM(2004)410 of 2 June 2004, p. 4.

⁸⁵ Paragraph 1.5.4.

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